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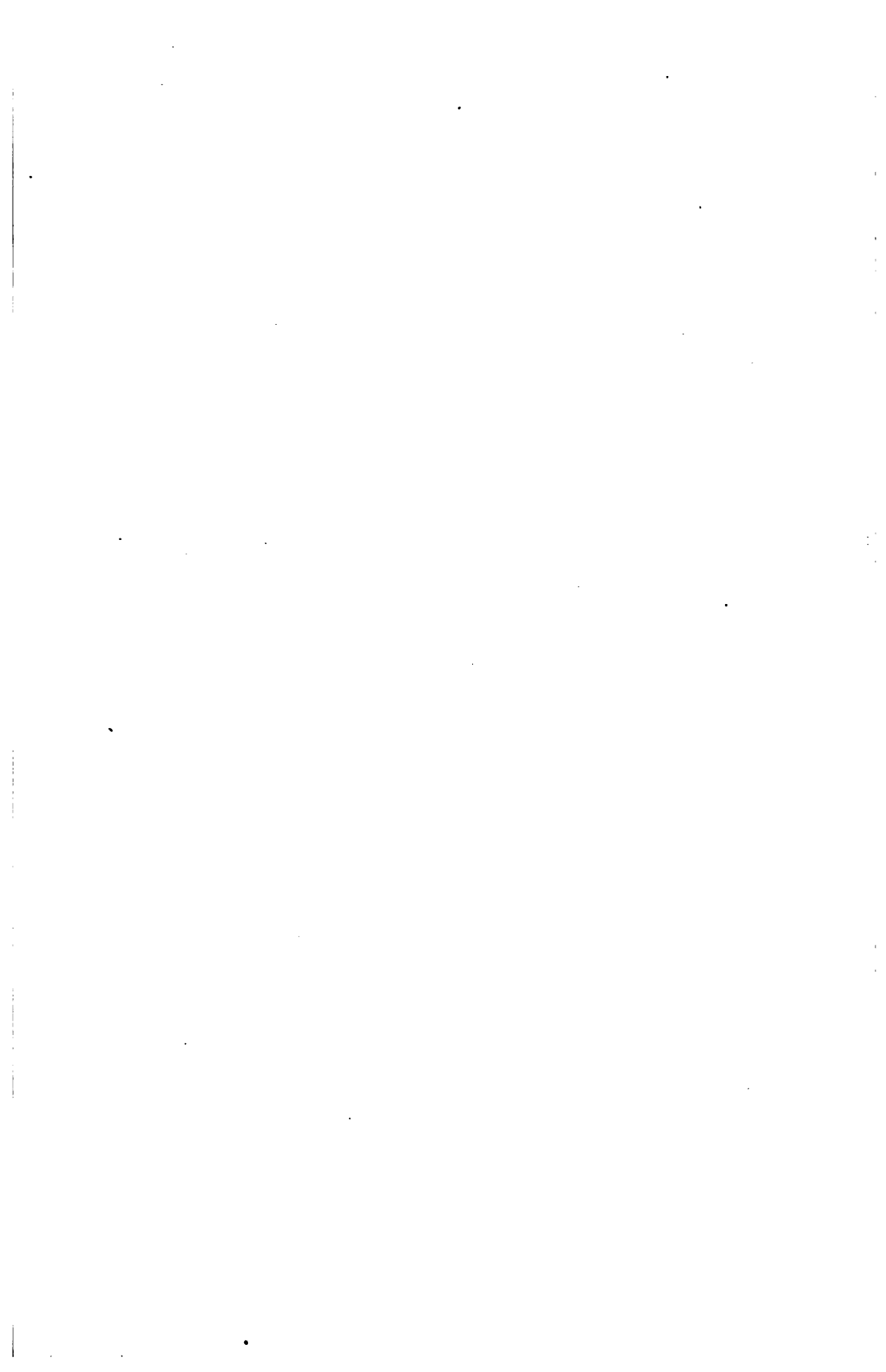


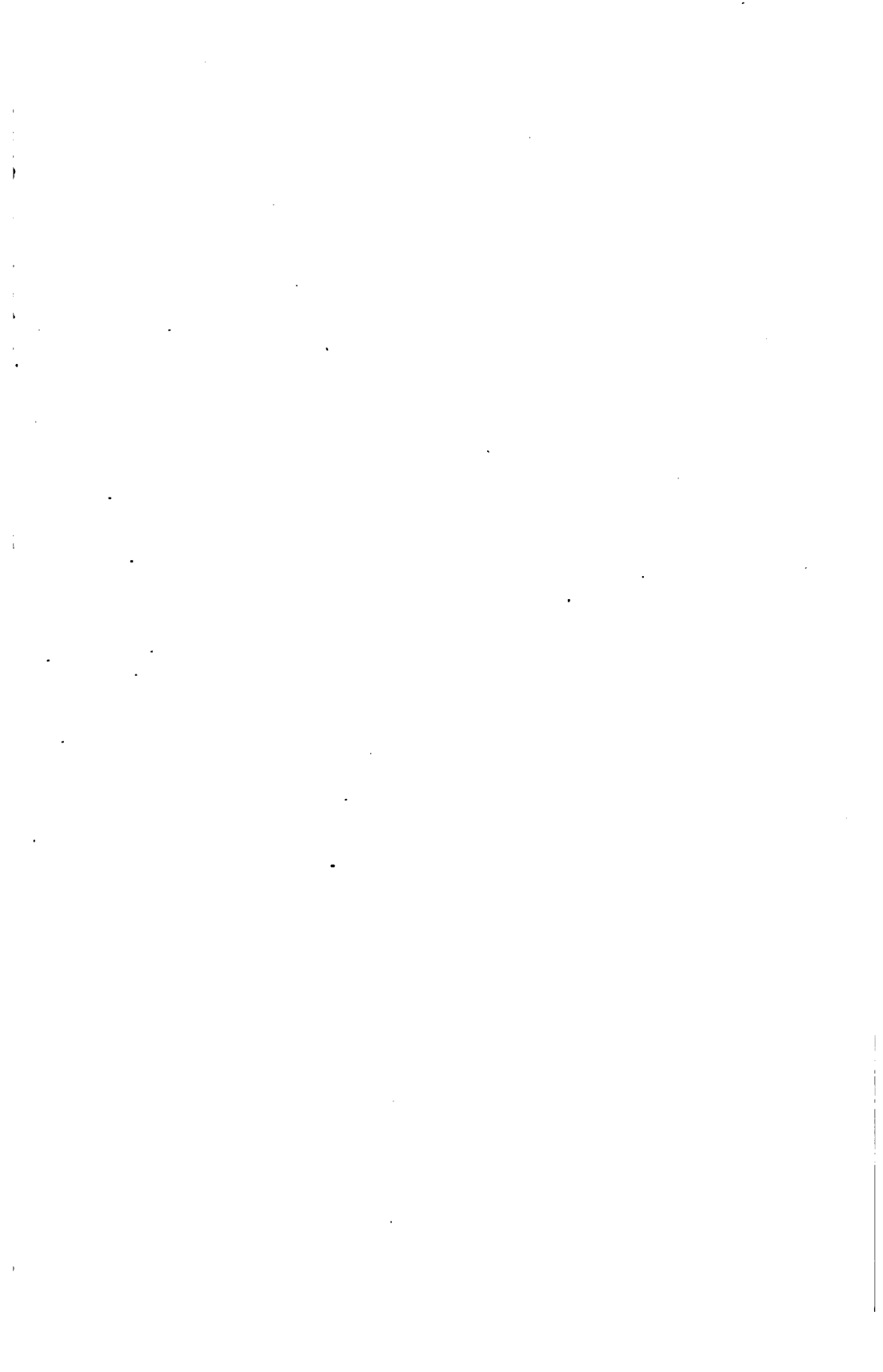
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATE'S COURTS

OF THE

STATE OF NEW YORK

TOGETHER WITH

**Cases in other Courts of the State Relating to
Decedents Estates**

WITH ANNOTATIONS

EDITED BY

CHAS. H. MILLS

OF THE ALBANY BAR

VOL. XIV

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REPORTS OF CASES
ARGUED AND DETERMINED IN
THE SURROGATES' COURTS
OF THE
STATE OF NEW YORK
WITH OTHER DECISIONS AFFECTING DECEDENTS' ESTATES.

Matter of the Estate of EDWARD TEN EYCK LANSING, Deceased.

(Surrogate's Court, Herkimer County, February, 1915.)

CHARITABLE INSTITUTIONS—PROVISIONS UNDER STATE CONSTITUTION FOR EDUCATION AND SUPPORT OF DEAF AND DUMB—WHEN COUNTY LIABLE FOR PAYMENT OF BILLS FOR RETENTION OF DEAF AND DUMB CHILD IN CHARITABLE INSTITUTION.

The State Constitution (Art. VIII, § 14) while permitting the legislature to make provision for the education and support of the deaf and dumb, forbids payment therefor for any inmate of a charitable institution wholly or partly under private control who is not received and retained therein pursuant to rules established by the State board of charities.

During the lifetime of decedent one of his six children, about six years of age, was, under section 928 of the Education Law, placed in the New York Institution for the Instruction of the Deaf and Dumb to be educated and supported at the expense of the county of Herkimer until he became twelve years of age. Later, he was transferred to the Central New York Institution for Deaf Mutes under said section 928, as amended in 1910 (now section 978 of said law). Upon the hearing of a claim of said county against decedent's estate for moneys expended for the

maintenance and education of said child up to the time of decedent's death it appeared that to the bill of each of said institutions against the county of Herkimer there was attached a certificate of the State board of charities "that the institution has complied with the rules of the board for the reception and retention of inmates." *Held*, that the meaning of each certificate was that each of said institutions had complied with all the rules which said board intended to be in force during the time named in each certificate and was a repeal or waiver of the enforcement of a rule of the State board of charities which provides that "No child under the age of sixteen years * * * shall be retained in any such institution as a public charge unless accepted in writing as such by the officer charged with the support and relief of the poor of the county * * * upon which such child * * * is sought to be made a public charge," and the county became liable for the payment of the bills, though there was no written acceptance by the superintendent of the poor of Herkimer county of the retention of said child in either of said institutions, and that the claim of the county for reimbursement from decedent's estate should be disallowed.

HEARING on claim for care, maintenance and education of a son of decedent at New York Institutions for the Instruction of the Deaf and Dumb.

E. C. Rice, for Herkimer county.

Robert F. Livingston, for executrix.

Wm. F. Lansing, special guardian.

BELL, S.—The county of Herkimer presented a claim to Marianna Yates Lansing as executrix of the will of said deceased of \$1,070.15, moneys expended for the maintenance and education of Yates Lansing at the New York Institution for the Instruction of the Deaf and Dumb, located in the city of New York, and at the Central New York Institution for Deaf Mutes, at Rome, N. Y.

This claim was disputed by the executrix and consents by

claimant and executrix filed that the claim be heard and determined by the surrogate upon the judicial settlement of the account of the executrix.

Edward Ten Eyck Lansing and Marianna Yates Lansing, his wife, had six children born as follows: Katherine in March, 1901; Yates, July 8, 1902; Mary in February, 1904; Content in November, 1905; Elizabeth in April, 1908; and Fox in October, 1909.

In May and June, 1908, Yates had a severe attack of scarlet fever, which was followed by deafness, mastoid abscesses and mastoiditis. This condition continued until December when the father and mother and the then five children went to New York City to have Yates operated upon. They lived in a flat until April, 1909. Yates was put in a hospital where he underwent two serious operations. After leaving the hospital he went with his parents, going back and forth to the hospital for treatment. He was weak and depressed and became totally deaf and dumb.

Katherine had a long and expensive treatment for her eyes.

In February, Content had scarlet fever, and the family were quarantined.

The mother did all of the housework and took care of the children, the father assisting in the care of Content. The doctor's bills were large and could not then be fully paid.

The family, except Yates, returned in April, 1909, to their farm in the town of Manheim, this county, where Mrs. Lansing did the household work and cared for the children, except when she was ill. They were not able to pay for assistance in the housework. The parents had no experience in bringing up or instructing deaf mutes.

On March 20, 1909, on the application of an uncle, E. V. Decker, supervisor of the second and third wards of the city of Little Falls, this county, made a certificate as follows:

" STATE OF NEW YORK,

" County of Herkimer, ss.:

" I have this day selected Yates Lansing of the town of Manheim, county of Herkimer, son of Edward T. E. Lansing, who was born on the 8 day of July, 1902, as a county pupil in the New York Institution for the Instruction of the Deaf and Dumb from the 31 day of March, 1909 to the 7 day of July, 1914 (he being then 12 years of age) to be educated and supported therein, during that period, at the expense of the county of Herkimer in conformity with the provisions of Section 2, Chapter 325, Laws of 1863, as amended by Chapter 213, of the Laws of 1875 and Chapter 36, Laws of 1892.

"(Signed) E. V. DECKER,

" Supervisor of the town of Little Falls, of 2nd and 3rd Wards, County of Herkimer."

" Dated, March 20, 1909."

And by virtue thereof Yates was on March 31, 1909, placed in the New York Institution for the Instruction of the Deaf and Dumb where he remained until in September, 1910.

On August 29, 1910, William Jennings, supervisor of the town of Manheim, this county, made certificate similiar to the one made by Supervisor Decker, except that the institution named was the Central New York Institution for Deaf Mutes, at Rome, to which institution Yates was transferred in September, 1910. Yates was placed in the New York Institution under section 928 of the Education Law and in the Rome Institution under section 978, being section 928 as amended in 1910.

From the time of going to New York city until the father's death, their income was not sufficient to maintain the family and they were running behind.

Mr. Lansing died October 28, 1910, leaving an estate of \$6,820.02.

The county has paid from March 31, 1909, to October 28, 1910, both inclusive, \$485.36, and if any sum is allowed against this estate it can be for that amount only.

The provisions for the care and instruction of deaf mutes were made a part of the Education Law in 1909 (in effect February 17).

Section 920 (made 970 in 1910) provides, that "All the institutions for the instruction of the deaf and dumb, and blind, and all other similar institutions, incorporated under the laws of the State, or that may be hereafter incorporated, shall be subject to the visitation of the commissioner of education, and it shall be his duty: To inquire, from time to time, into the expenditures of each institution, and the systems of instruction, pursued therein, respectively."

Section 927 provides for the maintenance and instruction of a deaf mute child under twelve years of age, who has become, or shall be liable to become, a charge for its maintenance on any of the towns or counties of this State, and makes it the duty of the overseers of the poor of such towns or the supervisors of such counties, without application, to place such child in one of the institutions named in section 928, viz: 1. The New York Institution for the Deaf and Dumb; or, 2. The Institution for the Improved Instruction of Deaf-Mutes; or, 3. The LeCouteulx Saint Mary's Institution for the Improved Instruction of Deaf-Mutes in the city of Buffalo; or, 4. The Central New York Institution for Deaf-Mutes in the city of Rome; or, 5. The Albany Home School for the Oral Instruction of the Deaf at Albany; or, 6. To any other institution in the State for the education of deaf-mutes, as to which the State board of charities shall have filed with the commissioner of education a certificate to the effect that said institution has been duly organized and is prepared for the reception and instruction of such pupils.

Section 927 applies only to a child who has, or shall be liable

to, become a public charge — it does not say between five and twelve years but under twelve, for such a child might become a public charge at one or four and may be without parent, guardian or friend, so that the responsibility for its maintenance and instruction must be put upon some one, and the legislature put it upon the overseers of the poor or supervisors, thus insuring proper maintenance and instruction for such a poor and unfortunate child.

This section was amended in 1910 (in effect April twenty-second) by changing the number of the section to 977 and "supervisors of such county" to "board of supervisors of such county."

Section 928 provided that any parent, guardian or friend of a deaf-mute child, within this State, over the age of five years and under the age of twelve years, may make application to the overseer of the poor of any town or to any supervisor of the county where such child may be, showing by satisfactory affidavit or other proof that the health, morals or comfort of such child may be endangered, or not properly cared for, and thereupon it shall be the duty of such overseer or supervisor to place such child in one of these institutions.

There is nothing in this section about becoming a public charge on any town or county. The only condition is, that it shall be shown by satisfactory affidavit, or other proof, that the health, morals or comfort of such child may be endangered, or not properly cared for, and when that is shown the overseer or supervisor has no discretion, but it becomes his duty to place such child in one of these institutions.

It is to be presumed when application was made to Supervisor Decker by an uncle of Yates, that it was shown by affidavit, or other proof, that the health, morals or comfort of Yates was in danger, or not properly cared for.

The circumstances and condition of the family warranted such a finding.

Supervisor Decker knew this family and I have no doubt but what he knew their circumstances and condition.

It seems to me that the health, morals or comfort of a deaf and dumb child would become endangered or not properly cared for, in nearly every home, unless the parents were able to maintain an instructor for deaf mutes there.

I believe this was the opinion of the legislature in 1910, for then this section was amended by omitting the health, morals or comfort condition, and changing: "it shall be the duty of such overseer or supervisor to place such child in one of the institutions," to "the overseer of the poor or supervisor * * * shall place such child in one of the institutions."

Section 929 provides that: "The children placed in said institution, in pursuance to the last two sections, shall be maintained therein at the expense of the county from whence they came, provided that such expense shall not exceed \$300 each per year, until they attain the age of twelve years, unless the directors of the institution * * * shall find that such child is not a proper subject to remain."

This section was amended in 1910 by making the number 979 and changing \$300 to \$325.

Section 930 now 980 provides that, "The expenses for the board, tuition and clothing for such deaf-mute children placed as aforesaid in said institutions, not exceeding the amount * * * above allowed, shall be raised and collected as are other expenses of the county from which such children shall be received; and the bills therefor, properly authenticated by the principal or one of the officers of the institution, shall be paid to said institution by the said county."

The State Constitution, article VIII, section 11, provides that "The Legislature shall provide for a State board of charities, which shall visit and inspect all institutions, whether State, county, municipal, incorporated or not incorporated, which are of a charitable, eleemosynary * * * character,

excepting only such institutions as are hereby made subject to the visitation and inspection of " certain commissions.

Section 13, " Existing laws relating to institutions referred to in the foregoing sections and to their supervision and inspection, in so far as such laws are not inconsistent with the provisions of the Constitution, shall remain in force until amended or repealed by the Legislature. The visitation and inspection herein provided for shall not be exclusive of other visitation and inspection now authorized by law."

Section 14, " Nothing in this Constitution contained shall prevent the Legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education, of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the Legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the State board of charities. Such rules shall be subject to the control of the Legislature by general laws."

Section 87 of the General Municipal Law authorizes boards of supervisors, etc., to appropriate and raise money by taxation and make payments therefrom to charitable, eleemosynary, etc., institutions, wholly or partly under private control, for the care, support and maintenance of their inmates, such payments to be made only for such inmates as are received and retained pursuant to rules established by the State board of charities.

The State Charities Law, section 2, provides that " The term ' State charitable institutions ' when used in this chapter shall

include all institutions of a charitable, eleemosynary * * * character, supported in whole or in part by the State, except institutions for the instruction of the deaf and dumb * * *

"§ 9. The State board of charities shall visit, inspect and maintain a general supervision of all institutions, societies, or associations which are of a charitable, eleemosynary * * * character * * * which are made subject to its supervision by the Constitution or by law, and shall:

"8. Establish rules for the reception and retention of inmates of all institutions which, by section 14 of article 8 of the Constitution, are subject to its supervision."

The county cites and invokes a rule of the State board of charities as amended November 15, 1910, 44th Annual Report, 1910, volume 3, page 994, which provides that: "No child under the age of sixteen years, unless committed for juvenile delinquency, nor any destitute minor or adult person, whether committed by any court or magistrate or otherwise received, shall be retained in any such institution as a public charge, unless accepted in writing as such by the officer charged with the support and relief of the poor of the county * * * upon which such child * * * is sought to be made a public charge, subject to such regulations as the board may from time to time prescribe."

There was no written acceptance by the superintendent of the poor of Herkimer county (he being the proper officer) of the retention of Yates Lansing, in either of these two institutions, and the county therefore claims that it is not liable for his maintenance and instruction therein, and that having paid therefor it should be reimbursed out of the father's estate to the time of his death.

The executrix contends that this rule of the State board of charities contravenes a general law, to wit: section 928, now 978, of the Education Law, and is, therefore, null and void.

There was attached to the bill of the New York Institution

for the Deaf and Dumb against the county, a certificate as follows:

" STATE OF NEW YORK,
" STATE BOARD OF CHARITIES,
" The Capitol, ALBANY, *October 1, 1909.*

" The State Board of Charities, hereby certifies that New York Institution for the Instruction of Deaf and Dumb, located at 163rd St. and 11th Ave., New York City, has filed with this Board in due form, certificates that the said Institution has complied with the Rules of the Board for the reception and Retention of Inmates, adopted pursuant to the provisions of the Constitution and the State Charities Law, down to the period ending September 1, 1909, and that such evidence is satisfactory to this Board.

" By Order of the State Board of Charities.

" No. 24349

ROBERT W. HILL, *Secretary.*"

And a similar certificate was attached to the bill of the Central New York Institution for Deaf Mutes against the county.

The Constitution (Art. VIII, § 14) permits, as claimed by the executrix, the legislature to make provision for the education and support of the deaf and dumb, but it forbids payment therefor for any inmate of a charitable institution wholly or partly under private control who is not received and retained therein pursuant to rules established by the State board of charities. (*People ex rel. New York Inst. for Blind v. Fitch*, 154 N. Y. 14, 38.)

Reading all of the provisions of the Constitution, relating to this subject, and these statutes together, I am of the opinion, that these certificates made by the State board of charities and attached to these bills, repealed, or waived the enforcement of, said written acceptance rule and the county became liable for the payment of the bills.

Each of these certificates certifies: " that the said Institution

has complied with the rules of the Board for the reception and retention of inmates."

This means that the institutions have complied with all of the rules which the board intended to be in force during the time named in the certificate.

Claim disallowed.

Matter of the Probate of a Paper Writing Purporting to be the Last Will and Testament of ANNIE COE MACDOWELL, Deceased.

(Surrogate's Court, Westchester County, February, 1915.)

TRUSTS—WHEN PROVISION FOR USE OF INCOME FOR HOME TO BE MAINTAINED FOR "REFINED, EDUCATED, PROTESTANT GENTLEWOMEN" VOID.

Where testatrix gave to her executors a certain sum in trust the income to be used for hiring a house to be maintained and used as a "Home for Refined, Educated, Protestant, Gentlewomen—whose means are small—and whose home is made unhappy, by having to live with Relatives, who think them in the way," but the will discloses that by such provision testatrix intended to provide a home for six relatives, naming them, and their descendants, naming them, and six friends, naming them, to the exclusion of all others, the trust attempted to be created is not a charitable trust and is absolutely void, and as to the *corpus* of said attempted trust it will be decreed that testatrix died intestate.

PROCEEDINGS upon the probate of a will.

Remsen & Parsons, for petitioner.

Reeves & Scrugham (Graham Witschief and William W. Scrugham, of counsel), for contestant.

SAWYER, S.—This is an application for the construction of a will. This court is asked to determine the validity of a certain trust mentioned therein.

The testatrix, Annie Coe MacDowell, died January 20, 1914, leaving her sister, Jessie M. Gibson, as her only next of kin and leaving a last will and testament which was duly admitted to probate by a decree of this court on July 27, 1914, reserving, however, for future determination the question of construction.

The provisions of the will to be construed are as follows:

" [Page 1.] I. Annie Coe MacDowell — being of sound mind and memory, and considering the uncertainty of this life, do make, publish and declare this to be my last will and testament — as follows — I give and bequeath to my executor and Trustee, here in after named, all my portion of my father's estate, now held in trust for me, under his last will; and which portion I have under his last Will, the right to bequeath, and in addition, all my own money, which is now in Bond & Mortgages, & Five Savings Banks — amounting to about Ten Thousand Dollars — To be well invested, and the Income derived from both, to be used for hiring a House, and maintaining same, in a respectable neighborhood, within the city limits of Yonkers, New York — To be used as a Home for Refined, Educated, *Protestant*, Gentlewomen — whose means are small — and whose home is made unhappy, by having to live with Relatives, who think them in the way. [Page 2.] This Home to be called the 'Mary Randol Memorial Home' — I wish the preference of being an Inmate of this Home, to be given to my Sister Jessie, and my Cousins, and their lineal descendants Forever. Namely — Mrs. Philip H. Remington — Miss Elizabeth Remington, of Windsor, Conn. — Miss Bessie Terhune, Mr. Richard Morrell — Passaic, New Jersey — Mr. Harry Masters, Passaic, New Jersey — Mr. Enos Randol Hyatt, 277 Broadway, N. Y. The same privilege is extended to my friends — Namely — Miss Mary A. Hall, Port Richmond, Miss Adelaide Hall, Port Richmond — Staten Island — Miss India Frances Bangs — Mrs. Enos Randol Hyatt — Miss Annie E. Scott, Washington, Iowa — Rev. Mrs. George W.

Huntington, Newburgh, N. Y. To come and go with perfect freedom, and not confined to rules. All the Inmates of this Home are to pay Board, each week they are there — with their small means — The price not to exceed — Seven Dollars per week — Towards paying the running expenses of the house — which will have a Housekeeper at the head — [Page 3] My hope is that my sister Jessie, will leave her half share of the estate, to this Home — in Memory of our dear Mother — Mary Randol — I ask Mr. James G. Wentz, and Mr. Enos Randol Hyatt — to take an interest in this Home — to see that it is properly conducted, and I appoint the Westchester Trust Company of Yonkers — N. Y. — as my Executor, and Trustee — to manage this estate, and pay the Interest, to a Committee of Seven Ladies & Gentlemen, to be chosen by The Board of Vestrymen of St Johns Episcopal Church of Yonkers — N. Y — for carrying on this Home — To be established in perpetuity. I hereby make the following bequests — To my Sister Jessie — I give the sum of One Dollar — as she has money of her own, independent of the other half of the estate, our father Mr. David MacDowell, left us — As a small token of my love for her, I give her my For-get-me not Ring, Gold Locket, containing our Mother and Father's pictures — Amethyst Necklace Aunt Frank's Pearl Ring (with small diamond in the center —)

* * * [Page 6] All my Furniture, Portraits, Pictures — Clocks, Ornaments, China, Glass — Solid Silver, and Plated Silver, both large and small pieces — Table Linen — Bedding — Pillows, Kitchen Utensils — any of my things, that are for house-keeping — I wish to be given toward furnishing the Mary Randol Home — As soon as practicable, after the probate of this my last Will — Should anyone wish to leave a Legacy to this Home — I would be glad to have them do so — and should the home be large enough to accommodate others than those mentioned in this Will — I wish the Committee of Seven Ladies and Gentlemen from [Page 7] St. Johns Church of

Yonkers — N. Y — to admit those Refined Gentlewomen who they judge most worthy. * * *

The trust attempted to be created is not limited by lives. It is in perpetuity. It is void unless it is a religious, educational, charitable or benevolent trust. (Pers. Prop. Law, §§ 11, 12; *Allen v. Stevens*, 161 N. Y. 122.)

It requires no argument to show that it is neither a religious nor an educational trust. If any trust was created by said will it is either a charitable or a benevolent one. What, then, is a charitable or a benevolent trust within the meaning of the statute?

This question has been duly considered at length by the Court of Appeals in *Matter of Shattuck* (193 N. Y. 446). The following is a portion of said opinion which defines a charitable trust: "The meaning of a charitable use or purpose in England is stated by Tudor on Charities and Mortmain (4th ed. 37) as follows: 'In the first place it may be laid down as a universal rule that the law recognizes no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community. The distinction between a public purpose and one which is not public is often fine. The principle deducible from the cases seems, however, to be as follows: If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose in reference to those particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion or other purpose charitable within the meaning of the Statute of Elizabeth without reference to any particular individuals and without giving any particular individuals the right to claim the funds, the gift is charitable.'

"It is defined by Pomeroy in his Equity Jurisprudence (2d ed., vol. 2, sec. 1019) as follows: 'In order that a trust may be charitable the gift must be for the benefit of such an indefinite *class* of persons that the charity is really a public and not a mere private benefaction.'

"In *Sherwood v. American Bible Society* (1 Keyes, 561) this court say: 'To constitute a charity the use must be public in its nature.'

"In *Smith v. Havens Relief Fund Society* (44 Misc. Rep. 594-608) referring to the law relating to charitable uses, it is said: 'It requires that the use shall be public, that the benefit shall be intended not for individuals as such but as representatives of a class; that the announcement of the altruistic aim shall not be a cover for the bestowal of a private bounty.' (Affirmed and opinion adopted and approved, 118 App. Div. 678; affirmed without opinion, 190 N. Y. 557.)

"In *Attorney-General v. Soule* (28 Mich. 153) a will directed the setting apart of \$10,000 to be expended according to the directions of the executors, 'For the establishment of a school at Montrose for the education of children.' It was held that the provision was so uncertain and indefinite as not to bind the trustees to an application of the fund to *public charity* or even perhaps to charity at all as recognized in courts of equity, but clothed them with a discretion broad enough to permit of their applying the fund to a private school.

"In *Stratton v. Physio-Medical College* (149 Mass. 505), the will gave one-fourth of the net income of the residue of the testator's property to the defendant to be used for the promotion of the medical art as favored and believed in by the testator during his lifetime and in support of that institution as the trustees thereof should from time to time determine. It appeared that the supposed corporation in the mind of the testator was neither free nor a public school, but a private pecuniary enterprise. It was held that such an enterprise is

not a public charity even if indirectly it serves charitable ends.

"In *Haynes v. Carr* (70 N. H. 463), the gift of the income of the trust there considered was given 'For the benefit of the poor and destitute in said State of New Hampshire and for charitable and educational *purposes* therein.'

"Although the trust was sustained as for *charitable purposes*, the court say: 'It is undoubtedly the law in most states that where property is given to trustees with power to apply it either to uses which are or those which are not within the classes included in charities the whole must fail so far as the application of the peculiar doctrines of charitable uses is concerned.'

"Every charitable gift must be actually dispensed by some individual and ultimately substantially every charitable fund must be applied to the relief of individual need, but the trust cannot for the reasons stated be made for individual beneficiaries as such. The general purpose of the trust must be the well being of humanity or some specified but indefinite class or part thereof.

"Fowler, in his work on Charitable Uses, says (p. 106): 'As we have no statute defining what are religious, educational and charitable uses and this statute (act of 1893) refers to none other than such as may be so classed, the courts must now determine what gifts are within the statute.'

"In view of the quite universal rule that charitable uses and public uses are synonymous, and the title of the act which is 'An act to regulate gifts for charitable purposes,' we repeat that the legislature intended to preserve charitable gifts made in trust to uncertain and indefinite beneficiaries, but did not intend to include in the purpose of the act gifts to private institutions or individuals."

Is the so-called trust then, attempted to be created by the will in question, a charitable one in the broad sense of the statute, as above defined, or is it one for the benefit of particular individuals?

If the testatrix had said in the will that the home she desired to found should "be used as a Home for refined, educated Protestant gentlewomen whose means are small and whose home is made unhappy, by having to live with relatives, who think them in the way" and then had stopped, the so-called trust would have been a charitable one within the statute. But, she goes on to say at page 2 of the will, as follows: "I wish the preference of being an inmate of this Home, to be given to my Sister Jessie, and my Cousins, and their lineal descendants forever, namely: Mrs. Philip H. Remington, Miss Elizabeth Remington, of Windsor, Conn.; Miss Bessie Terhune, Mr. Richard Morrell, Passaic, New Jersey; Mr. Harry Masters, Passaic, New Jersey; Mr. Enos Randol Hyatt, 277 Broadway, N. Y. The same privilege is extended to my friends, namely: Miss Mary A. Hall, Port Richmond; Miss Adelaide Hall, Port Richmond, Staten Island; Miss Inlia Frances Bangs, Mrs. Enos Randol Hyatt, Miss Annie E. Scott, Washington, Iowa; Rev. Mrs. George W. Huntington, Newburgh, N. Y."

The last clause of the will referred to shows conclusively to my mind that the testatrix intended to prefer these six relatives and their descendants. She also intended to prefer her six friends named. Her intention was to provide a home for these relations and their descendants and her friends to the exclusion of all others. This then would mean that the income of the so-called trust would be devoted, in part at least if not entirely, to a private use. This being so, the entire gift would be invalid.

In *Matter of Shattuck (supra)*, the court, at page 456, said as follows. "The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift and requires that the same shall be held invalid."

The argument of the learned attorney for the contestant advanced in his brief is reasonable and his conclusion is logical,

and to my mind meets the situation exactly. The portion of his brief referred to reads as follows:

"If Miss Mac Dowell had merely said that the home which she wished to found should be used as a home for 'refined, educated, protestant gentlewomen whose means are small and whose home is made unhappy by having to live with relatives who think them in the way,' and then stopped, the trust would undoubtedly have been a charitable one in the broad sense contemplated by the statute. But she did not stop there. She goes on to say, 'I wish the preference of being an inmate of this home to be given to my sister Jessie and my cousins and their lineal descendants,' naming specifically six persons, three of them men; and she continues, 'The same privilege is extended to my friends,' naming specifically six other persons. These persons so specifically and definitely named are to be given preference in the enjoyment of the benefits of the trust over the general class of persons defined as 'refined, educated, protestant gentlewomen whose means are small,' etc. They have a prior right to become inmates of the contemplated home. Such right cannot be denied them by the trustee. The trustee is given no discretion to exclude the specified persons from the benefits of the trust if they demand it. It is only in case the home, by receiving from other persons legacies which Miss Mac Dowell in her will solicits, should be large enough to accommodate others than those persons particularly mentioned by name in her will that the testatrix has empowered the advisory committee of ladies and gentlemen to admit those refined gentlewomen who they judge most worthy (pp. 6 and 7 of will). The testatrix did not contemplate that the persons specifically mentioned should belong to the general class of beneficiaries which she had defined as 'refined, educated, protestant gentlewomen whose means are small.' This is obvious from the fact that she has included among the specified persons three who are men and also her sister who, in another part of the will

(p. 3), she says 'has money of her own' in a sufficient amount apparently, to justify, in the mind of the testatrix, the gift to her said sister of one dollar only. The testatrix intended that these specified persons should be the beneficiaries of the trust which she attempted to create independent of the fact that they might not come within the class of 'refined, educated, protestant gentlewomen whose means are small' and possibly to the exclusion of that class entirely. The trustee, therefore, could not exclude them from the benefit of the trust because they might not come within that class. The primary object of the trust attempted to be created is, very obviously, to benefit the persons specifically named, and, only secondarily, to benefit the class of 'refined, educated, protestant gentlewomen whose means are small.'

"There are and there always will be, since the right descends, certain specified individuals who have the right to claim the benefit of the attempted trust. Such trust, therefore, is not public and for the general benefit of humanity, and the Shattuck (*supra*) case above cited says it must be, if it is to be saved by the statute as a charitable trust. It is a private trust for the benefit of particular individuals, and is, therefore, not charitable in the broad sense required to bring it within the protection of the statute validating charitable trusts for indefinite and uncertain beneficiaries. It is not saved by that statute from the effect of the statutes against perpetuities, and as it plainly contravenes the last mentioned statutes, it is absolutely void."

Clearly there is no charitable trust created under the will. The one attempted to be created is absolutely void.

The learned counsel for the proponent claims that the general purpose of the testatrix was to benefit a specified but indefinite class of the public with a preference to certain persons and their descendants, not as individuals but only as possible members of the specified class.

He also contends that "a charity which is otherwise public is not deprived of that character by directing that in the administration of the charity a preference be given among eligible persons," and cites the following cases in support of his contention: *Perin v. Carey*, 65 U. S. 465; *Dexter v. Harvard College*, 176 Mass. 195; *Darcey v. Kelly*, 153 id. 433.

I have been unable to find any cases in this jurisdiction supporting this contention, but, assuming that the doctrine which he sets forth is correct, it certainly would not apply in this case, as the specified persons who are given a preference could not be included as eligibles in the general class. The testatrix designates six in the preferred class specifically by name and their descendants, placing no limitation whatever on their right to a preference. In the case of one of them at least, the sister Jessie, is mentioned in the will as one "with means." She certainly would not be eligible to the general class as one having "small means." There is nothing to show that those mentioned in the preferred class are all "Protestants." Some may be Catholics or belong to other denominations. There are three men distinctly named in the preferred class and they certainly cannot qualify in the general class as "gentlewomen." So, that even if the contention of the learned attorney for the proponent is correct, the so-called preferred class certainly would not be eligible in the so-called general class.

A decree should be made declaring void the trust attempted to be created by the testatrix and adjudging that she died intestate as to the funds which she endeavored to bequeath to the Westchester Trust Company as trustee.

Decreed accordingly.

**Matter of the Judicial Settlement of the Account of WOODBURY
G. LANGDON, as Executor of the Last Will and Testament of
RANIERI R. VILANOVA, Deceased.**

(Surrogate's Court, New York County, February, 1915.)

**WILLS—DIRECTION TO EXECUTOR TO PURCHASE ANNUITY—WHEN BALANCE
OF PRINCIPAL OF ESTATE MUST BE HELD IN TRUST—WHEN YEARLY
ACCUMULATION NOT VOID.**

Where a will which as a whole was designed to accomplish testator's primary object of securing for his only daughter, an incompetent, every possible care and comfort during her life, directed the executor to purchase for her an annuity of \$425 and declared the same to be "in addition to the annuities I now hold for her lifetime or hers and my own of \$800 a year," the purchase by testator of an additional \$500 annuity is not an ademption of the one of \$425 and the executor must purchase the same as directed by the will.

The balance of the principal of the estate must be held by the executor in trust for the daughter during her life and from the income thereof he must make payment of the annuity and satisfy all expenses of the daughter's maintenance and hold any surplus income thereof to meet and defray any unforeseen additional or extraordinary expense for maintenance and support which does not presently exist.

Where a will contains no direction for the accumulation of income the necessary accumulation yearly resulting from the use of but a portion of the income is not a void accumulation under the statutes.

PROCEEDING upon the judicial settlement of the account of an executor.

Lord, Day & Lord, for executor.

Francis J. Hogan, for Julia Shandley.

Peter B. Olney, special guardian.

CONALAN, S.—Upon this executor's accounting a construction of the will of the testator is necessary. The testator was a

widower and had but one child, a daughter, Therese T. Vilanova, who is an invalid and incompetent and is at present cared for at St. Vincent's Retreat at Harrison, N. Y.

By the third paragraph of his will the testator directed his executor, out of any funds on deposit in banks or trust companies, to purchase an annuity of \$425 for the lifetime of said daughter and payable half yearly to himself as executor, "which shall be in addition to the annuities I now hold for her lifetime or hers and my own of \$800 a year." After the execution of the will the testator during his lifetime purchased an annuity of \$500, and the question is asked, should the executor now purchase an annuity of \$425 as directed by the third paragraph of the will or is the purchase by the testator during his lifetime of the additional \$500 annuity an ademption of this legacy? I am of the opinion that it is not. The executor, by the fourth paragraph of the will, was directed from the aggregate annuities to provide for the care and maintenance of his daughter by paying her board and expenses of forty dollars a month while she remained at St. Vincent's Retreat and ten dollars a month more for carriage drives, clothing and other incidentals, or, "if she shall cease to be a patient at said asylum, by otherwise supplying her needs and giving her suitable care." He was also directed from said annuities to pay one Julia Shandley twenty dollars a month for her services to the daughter of the testator in writing to her at least once a month and in procuring her necessary wearing apparel, carriage drives and generally looking after his daughter and seeing that her wants were supplied; such payments to be made only so long as Julia Shandley should render such services. Provision is also made by the fifth paragraph that in case his daughter shall so far recover from her ailment that she shall be able to leave the asylum and it shall be no longer necessary that she shall be under similar restraint, the executor shall be authorized to consent to have her well taken care of by Julia Shandley if

she be willing, or by some other proper person, and that "the cost of their living together be paid out of said annuities to such an amount as shall be necessary, with a suitable contribution by Julia Shandley to such expenses," and the executor "may also pay from said annuities or from *any of my estate available* such additional cost of maintenance of my daughter out of the asylum as they shall deem enough." The remainder of the estate is given one-half to St. Vincent's Retreat and the other half to Julia Shandley, if she shall be living at the death of the testator's daughter and shall have complied with his wishes concerning his daughter, and, if not, then all to St. Vincent's Retreat.

From a reading of the will it can readily be seen that the primary object which the testator had in view was to secure for his only and incompetent daughter for the rest of her life every possible care and comfort suited to her unfortunate circumstances and condition. The whole will is designed to accomplish this end. Her welfare was the all important wish of the testator. He did not mean by the fourth paragraph of the will to limit his executor to the expenditure of \$840 a year, but intended also to provide for emergencies and changes of circumstances, so that his daughter should not be deprived of the necessities of life or become an object of charity because there was but \$840 a year available, which, by reason of changes of condition, might at sometime be inadequate for her maintenance and support. Apparently, while she remains at St. Vincent's Retreat, \$50 a month will pay for her care and keeping, but it is possible that she may not remain there always or that St. Vincent's Retreat may not always be in existence, and she would have to be cared for elsewhere at perhaps a much higher price. The evident intent of the testator is that his estate, to whatever extent necessary, may be used for the proper maintenance and care of his daughter, and this is strongly emphasized by the fifth paragraph of the will, which provides for

the care of the daughter in the event of her becoming cured and being able to leave the asylum where she is now confined. In that event the executor is to pay "from *any of my estate available*" the additional cost of maintenance of his daughter out of the asylum. The testator knew that, if his daughter was cured and left the asylum, a much greater amount of money might be necessary to defray her living expenses. I, therefore, hold that the terms of the third paragraph of the will should be complied with and that the executor purchase an additional annuity of \$425.

The balance of the principal of the estate the executor should hold in trust for the daughter during her life and from the income thereof make the annuity payment and satisfy all expenses of the daughter's maintenance, and should hold any surplus income thereof to meet and defray any unforeseen additional or extraordinary expense for the maintenance and support of the testator's daughter which does not now exist. No express direction for an accumulation is contained in the will, and the necessary accumulation yearly resulting from the use of but a portion of the income is not a void accumulation under the statutes. (Hill v. Guaranty Trust Co., 163 App. Div. 374; Estate of Burns, 164 id. 363.)

Decreed accordingly.

Matter of the Judicial Settlement of the Account of SAMUEL R. WELSER and CHARLES BENNER, as Executors, etc., of the Last Will and Testament of EMILIE R. ROGERS, Deceased.

(Surrogate's Court, New York County, February, 1915.)

WILLS—PROVISIONS OF—SCHEME OF WILL SHOWING INTENTION TO DIVIDE PROPERTY INTO TWO PARTS—WHEN RESIDUARY LEGATEES NOT ENTITLED TO SECURITIES CONSTITUTING PART OF ESTATE RECEIVED BY TESTATRIX FROM HER FATHER.

The whole scheme of the will of testatrix showed that it was her intention to divide her property into two parts, to wit, one part her individual property and the other part that received by her from her father's estate, and that she intended that the principal of trust funds created in the second, third and fourth paragraphs of her will should consist of the entire estate actually received from her father irrespective of the form in which it might be invested. The fifth paragraph provided that "as to any other property or estate of which I may die seized or possessed and which did not come to me from my father's estate I give, devise and bequeath as follows:" The sixth paragraph provided: "All the rest, residue and remainder of my estate of every kind and nature, including such legacies as may lapse, I give, devise and bequeath to my friend * * * absolutely and forever." *Held*, that testatrix did not intend the residuary legatee to receive any of her father's estate and it should and was intended to form the principal of the trust funds created under the second, third and fourth paragraphs of her will.

The bequest of that portion of her estate received from her father was not limited or curtailed by a statement in her will that the securities representing such portion were in a certain box in a safe deposit company and the securities "belonging to my estate" were in another box in the same company, and that the residuary legatee was not entitled to securities constituting a part of the estate of testatrix received from her father though found in the latter box.

PROCEEDING upon the judicial settlement of the accounts of executors.

Sylvester L. H. Ward, for executors.

Joseph W. Goodwin, for Allan W. Cooke.

Harrison, Elliott & Byrd, for J. Blake White.

Armstrong & Keith, for Eleanor W. Perrine.

COHALAN, S.— The answer interposed to the account of the executors by Allan W. Cooke, the residuary legatee under the will of the above-named deceased, necessitates a construction of the will before a proper decree can be made directing distribution. Practically the sole question before the court for determination is: What constitutes the principal of the trust funds created under paragraphs second, third and fourth of the will? In order to properly determine this question the entire will must be taken into consideration, so as to ascertain the intent of the testatrix in connection with the creation of this trust estate.

The second paragraph provides:

"*Second.* Out of the one-half of the residuary estate of my father, Henry Randel, which I received under and by virtue of the last paragraph in the sixth clause of his last will and testament, duly proved before the Surrogate of the County of New York on the first day of October, 1901 (and my final accounting as executrix of which will was filed with the Surrogate of the County of New York on or about April 13, 1903), I give and bequeath to my second cousin, James E. Baremore, the sum of ten thousand dollars."

The third paragraph provides:

"*Third.* The remainder of the one-half of the residuary estate of my father, Henry Randel, referred to in the second clause of this my will, after deducting said bequest of \$10,000 to my second cousin, James E. Baremore, I give, devise and bequeath to my executors and trustees hereinafter named, to be divided by them into the six separate trust funds which are to be held by them separately upon trust to invest and reinvest the same and to collect and pay over the income and principal thereof as follows:"

The testatrix then sets forth six separate trusts consisting of three-fifteenths, three-fifteenths, two-fifteenths, two-fifteenths, three-fifteenths and two-fifteenths, respectively, of said remainder.

The fourth paragraph provides:

"*Fourth.* The other half of the residuary estate of my said father, Henry Randel, and as to which in the sixth clause of his said will he gave his wife, Caroline M. Randel, the power of appointment, and which half I received under such power of appointment, executed under the third clause of the will of my mother, said Caroline M. Randel, duly proved before the Surrogate of the said County of New York, May 9, 1904 (and my final account as executrix of which will was filed with the Surrogate of the County of New York on or about April 10, 1905), I give, devise and bequeath to my executors and trustees hereinafter named, to be divided by them into four separate trust funds which are to be held by them separately upon trust, to invest and reinvest the same and to collect and pay over the income and principal thereof as follows:"

The testatrix then sets forth four separate trusts, each consisting of one-quarter of such "other half of the residuary estate" of testatrix's father.

The testatrix then provided by the fifth paragraph that:

"As to any other property or estate of which I may die seized or possessed, and which did not come to me from my father's estate, I give, devise and bequeath the same as follows:"

The testatrix then sets forth some twenty-four bequests from this other or individual property of hers, as distinct from the estate which came to her from her father.

By the sixth paragraph of the will the testatrix gave to Allan W. Cooke all of her *residuary* estate by the following language:

"All the rest, residue and remainder of my estate of every kind and nature, including such legacies as may lapse, I give,

devise and bequeath to my *friend* Allan W. Cooke, absolutely and forever."

The seventh paragraph of the will gives to the executors and trustees a power of sale to convert any and all real and personal property at public or private sale, and at such time or times and on such terms as the executors and trustees shall in their discretion think proper and best.

The testatrix by the eighth paragraph nominated and appointed her executors, the accountants herein, and then stated as follows:

"The securities in which that part of my estate which came to me through the will of my father is invested are now kept in box No. 3789 in the Lincoln Safe Deposit Company, No. 32 East Forty-second street, in the City of New York. The other securities belonging to my estate are now kept in box No. 3777 in the said Lincoln Safe Deposit Company."

The will was executed July 14, 1910, and the testatrix died August 30, 1912. It appears from the agreed statement of facts submitted that Henry Randel, the father of the above-named testatrix, died in the year 1901, leaving a last will and testament, which was admitted to probate in New York county on October 1, 1901, and in which he appointed his daughter, Emilie R. Rogers, executrix and trustee.

By the fifth paragraph of the will of Henry Randel it was provided as follows:

"*Fifth.* I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of every kind and nature and wheresoever situated, to my executor and trustee hereinafter named or who may be appointed, and who may qualify, upon trust nevertheless to invest and reinvest my said estate from time to time as occasion may require, and to collect and get in the income derived therefrom, and after paying all taxes, assessments, interest charges and such sums as may be necessary to properly preserve and protect my real and

personal estate, to pay over the balance of income to my beloved wife, Caroline M. Randel, for and during her natural life."

By the sixth paragraph as follows:

"*Sixth.* I direct my executor and trustee hereinafter named or who may be appointed, and who may qualify, upon the death of my wife, Caroline M. Randel, to pay over one-half of said trust estate to such person or persons, corporation or corporations as my said wife by her duly executed last will and testament may direct or appoint, and to pay over the other half of my said trust estate to my next of kin and heirs at law in such proportions as they would take under the laws of the State of New York had I died intestate."

On April 13, 1903, Emilie R. Rogers filed an accounting in this court as executrix under the will of her father, the said Henry Randel, and a decree was entered thereon finally and judicially settling that account, and in and by that decree the value of the residuary estate of Henry Randel was fixed at \$526,879.77 and was represented by numerous securities. Caroline M. Randel died April 22, 1904, leaving a last will and testament which was admitted to probate by this court on May 9, 1904. Emilie R. Rogers duly qualified as executrix of that will. On April 10, 1905, she filed her account as executrix in this court, and the value of the residuary estate of Caroline M. Randel was fixed at \$3,250.57, consisting of cash only. At the time of the death of Caroline M. Randel, Emilie R. Rogers, as next of kin and heir at law of Henry Randel, and as appointee under the will of Caroline M. Randel, received the whole of the trust fund created by paragraphs fifth and sixth of the will of Henry Randel. That at the time of the death of Emilie R. Rogers numerous securities belonging to *her own* estate were in the safe deposit box known as No. 3777 in the Lincoln Safe Deposit Company. There were also numerous securities and of considerable value in box No. 3789

in the same safe deposit company, the Lincoln Safe Deposit Company, at the time of the death of Emilie R. Rogers, these being referred to by her in the eighth paragraph of her will as constituting that part of her estate received from the estate of her father, Henry Randel. The residuary legatee claims that by reason of the sixth paragraph of the will of Emilie R. Rogers he is entitled to such an amount as is determined by the proceeds of the securities found in box No. 3789 of the Lincoln Safe Deposit Company, in which were deposited her own securities, after making certain other money payments directed by paragraphs first and second of the will. It is maintained by the executors, on the other hand, and I think correctly so, that the testatrix intended that the principal of the trust funds created in paragraphs second, third and fourth of the will should consist of the entire estate actually received from her father, irrespective of the form in which it might be invested. That reference to box No. 3789 has nothing whatever to do with the trusts created and was manifestly intended by the testatrix only as an aid to her executors in locating the securities in which the residuary estate was invested. The whole scheme of the will shows an intent on the part of the testatrix to divide her property into two parts, to wit, her individual property and that received by her from the estate of her father. The fifth paragraph of the will provides that "as to any other property or estate of which I may die seized and possessed *and which did not come to me from my father's estate* I give, devise and bequeath as follows." Then follow the twenty-four subdivisions containing gifts to various persons and immediately followed by the sixth paragraph of the will giving all the rest, residue and remainder of her estate of every kind and nature to her friend, Allan W. Cooke, thus indicating that the residuary legatee was not to share in any of the estate of the testatrix coming to her from her father's estate. That was to go to her relatives.

In the accounting of Emilie R. Rogers, as executrix of her father's (Henry Randel's) estate, certain securities were set forth as constituting part of the estate. Among those securities was a certificate for 100 shares of the old Standard Oil Company of New Jersey stock. That certificate was found in box No. 3789 of the Lincoln Safe Deposit Company. Another certificate for 125 shares of the old Standard Oil Company of New Jersey stock was found in box No. 3777 in the Lincoln Safe Deposit Company, the latter box being the one owned by the testatrix individually and in which her personal securities were stored, and in that box were also certificates of shares of the subsidiary companies of said Standard Oil Company of New Jersey proportionately of 225 shares of the parent company, and no such certificates were found in box No. 3789. The residuary legatee maintains that the provisions of the eighth paragraph of the will control, and that he is entitled to all these securities contained in box No. 3777.

By the second and fourth paragraphs of the will the testatrix clearly bequeaths that portion of her estate received by her from her father, and as shown by her accounting to amount to \$526,879.77, and that bequest is not limited to or curtailed by the provisions of the eighth paragraph, which is merely an instruction to the executors as to where the securities representing this fund are to be found. The testatrix did not make specific bequests of these securities in box No. 3789 of the principal of said trust funds, but said trust funds are general legacies, the gross principal whereof is \$526,879.77, less the sums her will directs to be paid thereout. This is evidenced by reason of the gift of the sum of money, to wit, \$10,000, by the second paragraph of her will out of "her father's estate," and by the division of the estate into unequal fractions. (Matter of Fisher, 93 App. Div. 186; Matter of Hodgman, 140 N. Y. 421; Matter of Van Vliet, 5 Misc. Rep. 169; Matter of King, 122 App. Div. 354.)

I am of the opinion that the testatrix did not intend the residuary legatee to receive any of her father's estate and that the entire estate which the decedent received from her father should form and is intended to form the principal of the trust funds created by paragraphs second, third and fourth of the will.

Decreed accordingly.

Matter of the Estate of WINFIELD ROBBINS, Deceased.

(Surrogate's Court, New York County, February, 1915.)

WILLS—DIRECTION AS TO DISPOSITION OF ALL REST, RESIDUE AND REMAINDER—WHERE THE LANGUAGE OF IS INEXACT OR AMBIGUOUS—REAL MEANING OF TESTATOR—EXECUTORS AND ADMINISTRATORS.

Where the language of wills is inexact or ambiguous the courts frequently transpose or insert words or phrases, or even leave out or insert provisions in order to effectuate an intention that is with reasonable certainty to be gathered from the whole text of the instrument.

The will of testator directed all the rest, residue and remainder of his estate put in trust for his brother during his lifetime; in case of the death of testator leaving no issue living and of the death of said brother said estate was given to three second cousins of testator, naming them, "they to take such portion as they may deem necessary to build a town hall." Said brother died seven weeks after testator bequeathing all his property to his wife who was also his sole executrix. Testator herein left him surviving no widow or children and said three second cousins were the executrices under his will. The widow of the testator's brother, by a release containing no words of assignment, discharged the estate of testator herein and his executrices, their successors, heirs, executors and administrators from any and all demands, if any, which she had personally and as executrix and legatee under the will of her husband against the estate of his brother and his executrices, and thereafter she assigned to said executrices as individual grantees all her right, title and interest in the estate of testator herein.

Held, that a literal reading of said testator's will did not express his real meaning, that what he really meant was that in case of his death without issue then and in that event and after the death of his brother

the estate theretofore held in trust for him should go to said three second cousins.

That the ancillary administrator of the goods, chattels and credits of a legatee under testator's will took nothing under the release above mentioned and his objections to the account of the executrices of testator herein seeking to surcharge them with the amount of certain items, among others with the amount paid out for the erection of the town hall provided for by testator's will, should be dismissed and the referee's report sustaining them overruled and the account settled and allowed as filed.

EXCEPTIONS to the report of a referee appointed to hear and determine all questions arising upon the judicial settlement of the accounts of executrices.

Elbridge G. Duvall (Charles H. Beckett, of counsel), for executrices.

Daniel J. Mooney (John B. Stanchfield and William M. Parke, of counsel), special guardian for ancillary administrator of estate of Edwin Robbins.

FOWLER, S.—This matter comes on upon exceptions to the report of a referee appointed to hear and determine all questions arising upon the judicial settlement of the account of Caira Robbins and Eliza Parker Robbins, executrices of Winfield Robbins, deceased.

Upon the judicial settlement of such accounting of the executrices under the last will and testament of Winfield Robbins, deceased, the special guardian of an incompetent and the ancillary administrator of the goods and chattels which were of Edwin Robbins appear and interpose objections. These objections are serious in their consequences and, as they have been sustained by the learned referee, result in surcharging the account of the executrices with the large sum of \$274,230.51. This surcharge is composed of one item for an alleged overpayment for transfer taxes made to the states having jurisdiction over the decedent's property; another item represents loss on

the sale of securities, which are claimed to have been sold at an inadequate price; another item consists of an alleged overpayment for legal services, but the most important item is for \$229,103.67, which it is held by the referee has been erroneously paid out by the accountants for the erection of a town hall in the Town of Arlington, Massachusetts, instead of to the contestants as next of kin. The testator's will provided for the erection of such town hall.

At the outset the question arises for determination whether or not the objectants are entitled to urge their objections. The correct answer to this question depends upon a construction of the will of the testator, and also, under the claim of the objectants, upon the effect of a release hereafter mentioned. The will of the deceased is as follows:

"I, Winfield Robbins, of the City of New York, in the State of New York, do make and declare my last will and testament to be as follows:

"*First.* I order and direct my executrices hereinafter named to pay all my just debts and funeral expenses, and in case of my death in a foreign land to purchase a plot in a Protestant cemetery in which to place my remains and cause to be erected over the same a monument to cost about ten thousand dollars.

"*Second.* I give and bequeath legacies as follows: To Edwin Robbins or his wife, ten thousand dollars; to Alvin Robbins, ten thousand dollars; to Ida Francis Robbins, thirty thousand dollars; to Eliza Parker Robbins, thirty thousand dollars; to Cairra Robbins, forty thousand dollars and my personal effects of every description.

"*Fourth.* I give and bequeath to the Robbins' Library in the Town of Arlington, State of Massachusetts, the sum of twenty-five thousand dollars. The principal is to be kept intact, and the interest of said twenty-five thousand dollars to be devoted to the care, preservation and increase of my collec-

tion of prints. The disbursement of the interest of the fund and the supervision of my collection of prints to be under the sole control of Caira Robbins so long as she may desire.

"*Fourth.* All the rest, residue and remainder of my estate, real or personal, of which I die seized and possessed or in any way or manner interested in or entitled to and wheresoever the same may be situated, I place in trust for my brother Milton Robbins during his lifetime.

"*Fifth.* In case that I shall die leaving no issue living and my brother shall have deceased also, I give, devise, and bequeath all the property and estate in trust for my brother, Milton Robbins, to Ida F. Robbins, Eliza P. Robbins and Caira Robbins, they to take such portion as they may deem necessary to build a town hall in the Town of Arlington, Massachusetts, in memory of Amos Robbins, a citizen of New York, born in West Cambridge, the Town of Arlington agreeing to remove the Alvin Robbins house from off the present park site.

"*Sixth.* I hereby nominate and constitute and appoint my cousins Caira Robbins and Eliza Parker Robbins to serve without bonds, and the survivor of them executrice of this my will.

"In witness whereof I have hereunto set my hand and seal this second day of October, one thousand nine hundred and seven.

WINFIELD ROBBINS. [SEAL.]

"Signed, sealed, published and declared by the testator, Winfield Robbins, as and for his last will and testament in the presence of us, who at his request and in his presence and the presence of each other have hereunto subscribed our names as witnesses. VINCENT LOESER, [SEAL.] 320 West 108th Street, New York. ZENAS E. NEWALL, [SEAL.] 101 North Broadway, Yonkers, N. Y."

It will be incidentally observed that the testator erred in the numbering of the paragraphs of his holographic will. The testator died November 5, 1910. Milton Robbins, mentioned

in the paragraph properly numbered "fourth" of the will of the decedent, survived the testator, but died seven weeks thereafter. Milton Robbins left a will by which all of his property was bequeathed to his wife, Emma Robbins, who was also appointed the sole executrix. The testator left him surviving no widow or children, and therefore Milton Robbins was the nearest of kin. Caira Robbins and Eliza Parker Robbins, the executrices, and Ida F. Robbins, their sister, are second cousins of the testator.

On October 3, 1911, the aforementioned Emma Robbins executed a release, which has been given in evidence. It provides as follows:

"Know all men by these presents, that I, Emma Robbins, of New York, N. Y., in consideration of \$1 and other valuable considerations to me paid by Eliza Parker Robbins and Caira Robbins, as they are executrices under the will of Winfield Robbins, do hereby, for myself, my heirs, executors, administrators and assigns, remise, release and forever discharge the estate of the said Winfield Robbins and the said executrices, their successors, heirs, executors and administrators, from all claims and demands, if any, I have personally and as executrix and legatee under the will of Milton Robbins against said estate of Winfield Robbins and said executrices.

"Witness my hand and seal this 3d day of October, 1911.
EMMA ROBBINS. [L. S.]

"In the presence of E. G. DUVALL."

During the course of the proceeding the accountants offered also in evidence an assignment, dated May 7, 1913, by which Emma Robbins assigns and sets over unto the executrices all her right, title and interest in the testator's estate, naming the executrices as individual grantees. This instrument was excluded from evidence over the exception of the accountants. The exclusion was, I think, error.

The rights of the contestants and their standing in this pro-

ceeding are to be determined by a construction of the portions of the will before set out, as modified by the release and also the assignment, offered in evidence, in so far as it is properly to be considered.

The claim of the contestants is briefly this: That under paragraph fifth of Winfield Robbins' will, the residuary bequest did not vest in the legatees therein named upon the death of Milton Robbins, because Milton Robbins did not predecease the testator, and further, that as Milton Robbins took a remainder interest as next of kin remaining after the life estate bequeathed to him, the release executed by his sole legatee and legal representative operated to the benefit of the contestant, who after said Milton Robbins are the nearest of kin. That is, their contention is that under the will of Winfield Robbins the remainder interest in the residuary estate was not bequeathed, and therefore Milton Robbins took the same as next of kin, and thereafter when his legal assignee (or testamentary donee) released that interest by operation of law the testator's cousins then took. Therefore, before such cousins can maintain their objections in this proceeding the will must be construed to result in a partial intestacy and the release must be given the legal effect of assigning to the cousins as next of kin what otherwise would be distributed to him whom the law recognizes as the next of kin.

The will of the testator is ambiguous. A literal reading thereof does not, I think, express the testator's real meaning. He did not intend that the three ladies named in the fifth paragraph of the will should take only upon the double contingency of the testator dying without issue and his brother having predeceased him. In the fourth paragraph of the will the testator bequeaths the residuary estate in trust for the benefit of his brother during his lifetime, and in the fifth paragraph he indicates an intention that the residuary estate so bequeathed in trust should go to Ida F. Robbins, Eliza P. Robbins and Caira Robbins. The words "and my brother shall have

deceased also " do not, I hold, indicate an intention to make the death of the brother prior to the testator a condition precedent of the bequest to the three ladies named in the fifth paragraph. The only effect that those words have is to reiterate that the bequest in the fifth paragraph is a remainder interest. It certainly would be a senseless disposition for the testator to say in the fourth paragraph of his will that he gives Milton Robbins a life interest and then in the fifth paragraph to provide that the property which had been so given in trust for Milton Robbins should go to some one else, only if Milton Robbins did not survive the testator; upon that other contingency no trust estate would come into evidence, and the words " all the property and estate in trust for my brother Milton Robbins " would have to be deemed mere surplusage. What testator really meant was that in case of his death without issue, then and in that event after the death of the brother the estate theretofore held in trust for the brother should go to the three ladies named.

Where the language of wills has been inexact or ambiguous the courts frequently transpose or insert words or phrases, or even leave out or insert provisions in order to effectuate an intention that is with reasonable certainty to be gathered from the whole text of the instrument.

(Dreyer v. Reisman, 202 N. Y. 476. See, also, Phillips v. Davies, 92 N. Y. 199.)

It would therefore seem that the contestants in this proceeding are not in any way interested in the distribution of the decedent's estate. But even were contestant's construction of the will adopted, the same conclusion would follow. The instrument of release contains no words of assignment. In order to give the contestants any interest in the estate that instrument must be construed to have the effect (assuming that there was a partial intestacy) of transferring and assigning the distributive share of Milton Robbins as next of kin to collaterals next

further removed from the testator. In *Amherst College v. Ritch* (151 N. Y. 282, 338), the Court of Appeals pointed out the distinction between an instrument of release and an assignment and said that where the word "release" is used in connection with "claims" it never has any other meaning than that of waiver, surrender or relinquishment, and that no right of action could pass by a release of that nature. The release by its terms does not purport to release any claim which the releasor has as next of kin. Even if it be construed as an assignment, it is not broad enough to transfer a distributive share as next of kin. There is a broad distinction between the interest which a party has under a will and that which he has as next of kin, and a release effective for one purpose would not be sufficient for the other. For example, in *Matter of Andrews* (104 App. Div. 622), the Appellate Division for the First Department held that a release of an interest by way of legacy did not estop the legatee from asserting a claim as next of kin.

In order to sustain the contention of the contestants the construction of the instrument as a release would not be sufficient. The mere release to the executrices of the claim of Emma Robbins would not *per se* transfer that portion of the estate as to which there is an intestacy to the contestant. The cousins are not next of kin. The failure of the testator to dispose of his entire estate would give such portion not disposed of to the next of kin and only to those who are such at the time of the death of the testator. It is well settled that those only are next of kin who are such at the date of the death of the testator. (*Clark v. Cammann*, 160 N. Y. 315; *Doane v. Mercantile Trust Co.*, id. 494; *Simonson v. Waller*, 9 App. Div. 503.) And this is so even if the tenant for life under the will is the sole next of kin. The release executed by the brother's representative and sole legatee did not exclude him from being the next of kin and could not make the cousins stand in that relation. The statute operated once and could not be invoked a second time. In

short, the only manner in which the representative of the brother could dispose of his distributive share would be by an assignment, and, as above stated, the release should not be deemed an assignment.

The distinction between a release by a legatee under a will and a release by one of the next of kin, where there is no will, is marked. Where a legatee releases the residuary or where there is not a sufficient residuary clause the next of kin take; in the one case by virtue of the will and in the other case by the operation of law through intestacy. But where there is no will the release by next of kin, in order to devolve the share released upon another, must operate as an assignment, because the law does not construe a release as an assignment. The case of *Matter of Wolfe* (179 N. Y. 599), and *Matter of Cook* (187 id. 253), well illustrate the distinction between an instrument which is sufficient operating as a release and one which can be sufficient only if operating as an assignment. In the report in *Matter of Wolfe* in the Appellate Division (89 App. Div. 349, 354) the court says: "It may well be that a different question would be presented by a transfer operating under the laws of inheritance or descent. In such a case the transfer is effected by operation of law and calls for no act of volition on the part of the heir or next of kin." In short, the difficulty in giving the release the effect urged by the contestants is that there is no rule of law which enlarges the release into an assignment. If the contestants take nothing under the release, it is perhaps unimportant to consider the second instrument purporting to be an assignment, but it would seem, no rights having intervened, that the second instrument may be given effect according to its tenor.

The accountants moved to dismiss the objections and they are dismissed and the referee's report is overruled. The account and supplemental account are settled, allowed and adjusted as filed.

Decreed accordingly.

Matter of the Estate of HEBER R. BISHOP, Deceased.

*(Surrogate's Court, New York County, February, 1915.)***EXECUTORS AND ADMINISTRATORS—ACCOUNTING—AGREEMENT AS TO MANAGEMENT OF TRUST FUNDS NOT ENFORCEABLE AGAINST TRUSTEES—WANT OF CONSIDERATION FOR PROMISE OF LIFE TENANTS TO WAIVE THEIR RIGHT TO PROPORTIONATE SHARE OF EXTRAORDINARY DIVIDENDS.**

Executors, upon accounting as such in 1908, paid over to themselves as trustees the residuary estate of their testator which, in part, consisted of certain shares of the stock of the Standard Oil Company of New Jersey which were equally divided among the eight trust funds created for the eight children of decedent. Thereafter, by the decree of the federal court dissolving said corporation it was ordered to distribute to its stockholders the stock held by it in its subsidiary companies. In March, 1912, an agreement under seal prepared as disclosed by its recital by the trustees for the purpose of exempting them from any liability for a failure to dispose of the stocks of said subsidiary companies as well as to avoid the then perplexing question of apportionment of stock dividends, provided: "Now, in consideration of the premises and of the undertaking of the trustees not to sell the said stocks prior to the receipt or declaration, as the case may be, of the stock dividends now declared or about to be declared, nor earlier than in the exercise of their sound discretion the trustees shall deem for the benefit of the principal of the trust in question, the undersigned, each for himself and in respect of all his present and future right under any one or more of the provisions of the will and codicils of * * * deceased, hereby requests the trustees to continue in the said several trusts the stocks above mentioned until, in the exercise of their sound discretion, they shall deem a sale thereof for the benefit of the principal of the trust in question, and hereby waives and releases any and all right to have any and all stock dividends heretofore or hereafter declared upon stock of the Standard Oil Company (of New Jersey) or of any of the said subsidiary companies deemed income, and requests that the same is deemed and taken to be principal of the trust in each case in question. In consideration of the foregoing the trustees aforesaid undertake not to sell any of the said stocks until, in the exercise of their discretion, they shall deem a sale for the benefit of the principal of a trust for which the same shall be held, and until such a sale to credit any such stock dividends to the principal of the trust fund in question." This agreement was signed by the trustees, by all the life tenants and by such of the remaindermen as were of full age. Upon the accounting of the trustees, *held*:

That the trustees were in duty bound to retain the stock in the subsidiary companies until in the exercise of prudence it appeared advisable to dispose of it for the benefit of the trust funds, and their promise so to do was not a sufficient consideration to support a contract.

That said agreement was not enforceable as a contract between the remaindermen and the life tenants because it was not signed by all the remaindermen and, further, that no contract between them and the life tenants could bind the trustees in the management of the trust funds.

That as the trustees did not agree to do anything except what the law compelled them to do there was no consideration for the promise of the life tenants to waive their right to their proportionate share of the extraordinary dividends declared upon the stock of the subsidiary companies and the alleged contract was not enforceable against them by the trustees.

That said agreement was not enforceable by the remaindermen as a contract made between the trustees and the life tenants for the benefit of the remaindermen because the want of consideration for the promise of the life tenants rendered said agreement unilateral and unenforceable.

That if said agreement could be construed as an assignment or transfer by the life tenants of their right to a part of the income of the trust funds which had not accrued at the date of the instrument, it would be invalid under section 15 of the Personal Property Law.

That said agreement did not prevent the life tenants from demanding that the trustees pay to them their share of the extraordinary dividends declared upon the stock of the subsidiary companies of said corporation which constitute a part of the trust fund and that the trustees upon the present accounting should apportion such dividends between the principal and income in accordance with the rule enunciated in *Matter of Osborne* (209 N. Y. 450).

PROCEEDING upon the accounting of trustees.

Spooner & Cotton, for petitioners.

A. Perry Osborn, special guardian for Francis C. Bishop.

Cary & Carroll (Guy Cary and Arthur C. Blagden, of counsel), for Heber R. Bishop et al.

Daniel J. Mooney, special guardian.

Shattuck, Glenn, Huse and Ganter (Garrard Glenn, of counsel), for James C. Bishop.

Daniel L. Cady, for Harriet B. Arnold.

FOWLER, S.—The trustees of the trust fund created by the will of the decedent have filed a voluntary account of their proceedings as such trustees, and the *cestuis que trustent* have filed objections thereto. The objections relate to the failure of the trustees to apportion between the life tenants and the remaindermen certain extraordinary dividends declared upon the stock of corporations which constitutes part of the trust fund. The rule enunciated by the Court of Appeals in *Matter of Osborne* (209 N. Y. 450), would have enabled the trustees to properly apportion the extraordinary dividends between the life tenants and the remaindermen were it not for a certain instrument executed on the 3d of March, 1912, by the trustees, the life tenants and some of the remaindermen, which, in the opinion of the trustees, renders it doubtful whether the life beneficiaries are entitled on this accounting to any part of these extraordinary dividends. The trustees, therefore, have submitted to the court for determination the question of the validity and effect of that instrument. I entertain no doubt of the jurisdiction of the court to determine upon this accounting the respective rights of the life tenants and remaindermen and the validity and effect of the instrument above referred to. (Code Civ. Pro., §§ 2510, 2731.)

The decedent gave his residuary estate to trustees and directed them to divide it into eight shares, and to hold one of such shares for the benefit of each of his eight children during the term of his or her natural life, and to pay the net income of such share to the child for whom it was set apart, quarterly, and after the death of each child the share held in trust for him or her to be paid to his or her issue surviving. There were other provisions providing for the disposition of the property in certain contingencies, but they are not material to the questions raised by the objections to the account.

The executors were authorized to retain the securities which the decedent owned at the time of his death, and to continue such investments for such time as they considered advisable, and to invest the trust funds in such bonds and railroad securities as they deemed safe or desirable. They were given discretionary power of sale and investment of the securities constituting the trust fund, and were not limited to the securities prescribed by law for the investment of such funds.

The executors accounted as such in December, 1908, and at that time paid over to themselves as trustees the residuary estate of the decedent. Part of the trust fund thus paid over consisted of 1,598 shares of stock of the Standard Oil Company of New Jersey, and these shares of stock were equally divided among the eight trust funds created for the eight children of the decedent. Subsequently to the creation of these trust funds the Standard Oil Company of New Jersey was dissolved by a decree of the Circuit Court of the United States, and was ordered to distribute to its stockholders the stock held by it in its subsidiary companies.

On March 3, 1912, the trustees prepared an instrument entitled "Request and consent of life tenants under will of Heber R. Bishop to continue holdings of stock in subsidiary Standard Oil Companies." The preliminary recitals in this instrument state, among other things, that the trustees hold as part of the trust fund a certain number of shares of the Standard Oil Company of New Jersey; that under a decision of the United States Circuit Court the Standard Oil Company of New Jersey was directed to distribute to its stockholders the stock of its subsidiary companies; that some of the subsidiary companies had, since the said distribution, declared, or were about to declare, dividends on their own stock; that it had been the intention of the trustees to sell the stock of the subsidiary companies declaring or likely to declare stock dividends in order to retain the value thereof for the remaindermen interested; that the life

tenants desired that the stocks in the subsidiary companies should not be sold at present, and that the remaindermen who were of age desired that the stocks should continue to be held by the trustees. After these recitals the instrument reads:

"Now, in consideration of the premises and of the undertaking of the trustees not to sell the said stocks prior to the receipt or declaration, as the case may be, of the stock dividends now declared or about to be declared, nor earlier than in the exercise of their sound discretion the trustees shall deem for the benefit of the principal of the trust in question, the undersigned, each for himself and in respect of all his present and future right under any one or more of the provisions of the will and codicils of Heber R. Bishop, deceased, hereby requests the trustees to continue in the said several trusts the stocks above mentioned until, in the exercise of their sound discretion, they shall deem a sale thereof for the benefit of the principal of the trust in question, and hereby waives and releases any and all right to have any and all stock dividends heretofore or hereafter declared upon stock of the Standard Oil Company (of New Jersey) or of any of the said subsidiary companies deemed income, and requests that the same is deemed and taken to be principal of the trust in each case in question.

"In consideration of the foregoing the trustees aforesaid undertake not to sell any of the said stocks until, in the exercise of their discretion, they shall deem a sale for the benefit of the principal of a trust for which the same be held, and until such a sale to credit any such stock dividends to the principal of the trust fund in question."

This agreement was signed by the trustees, by all the life tenants and by the remaindermen who were of full age. Most of the remaindermen were infants and, therefore, did not join in the execution of the instrument.

The special guardian for the infant remaindermen contends that the effect of this instrument is to preclude the trustees

from paying to the life tenants that portion of the extraordinary dividends declared by the Standard Oil subsidiary companies to which they would be entitled under the decision of the Court of Appeals in *Matter of Osborne* (*supra*). This contention can only be sustained upon the theory that the instrument created a contract between the trustees and the life tenants, or between the trustees and the life tenants for the benefit of the remaindermen, or that it is evidence of a gift by the life tenants to the remaindermen of their interest in the extraordinary dividends.

It cannot be enforced as a contract between the remaindermen and the life tenants, because of the seventeen persons interested as remaindermen only five signed it. The instrument is under seal and cannot be enforced by those who were not a party to it. (*Case v. Case*, 203 N. Y. 263.) Besides, no contract could be entered into between the remaindermen and the life tenants which would bind the trustees in the management of the trust fund. The remaindermen could not compel the trustees to sell the stock of the subsidiary companies held for them as part of the trust fund, nor could they prevent the trustees from selling the stock whenever in their discretion they considered such sale advantageous to the trust. Therefore the remaindermen could not by any contract with the life tenants limit the rights granted to the trustees in the will, or extend their powers beyond those granted in that instrument. It, therefore, remains to be determined whether the instrument can be given effect as a contract between the trustees and the life tenants.

The promise of the trustees, which is the consideration for the waiver and release of the life tenants, is contained in the last paragraph of the instrument, wherein they undertake not to sell any of the stocks until, in the exercise of their discretion, they shall deem a sale for the benefit of the principal. But this is a duty imposed upon them by law. Trustees "are bound in the management of all the matters of the trust to act in good faith and employ such vigilance, sagacity, diligence and pru-

dence as in general prudent men of discretion and intelligence in like matters employ in their own affairs." (*Costello v. Costello*, 209 N. Y. 261.) Therefore the law imposed upon the trustees the duty of retaining the stock in the subsidiary companies of the Standard Oil Company until such time as, in the exercise of prudence and intelligence, it appeared advisable to dispose of them for the benefit of the trust fund. Their promise to do so was merely a promise to perform a duty imposed upon them by law, and such a promise is not a sufficient consideration to support a contract. (*Robinson v. Jewett*, 116 N. Y. 40; *Vanderbilt v. Schreyer*, 91 id. 392.) Therefore, as the trustees did not agree to do anything except that which the law would compel them to do, there was no consideration for the promise of the life tenants to waive their right to their proportionate share of the extraordinary dividends declared upon the stock of the subsidiary companies, and the alleged contract is not enforceable against them by the trustees. (*Winslow v. Mayo*, 123 App. Div. 758; *affd.*, 195 N. Y. 551; *Joseph v. Sulsberger*, 136 App. Div. 499; *Riker v. Comfort*, 140 id. 117.)

Nor is it enforceable by the remaindermen as a contract made between the trustees and the life tenants for the benefit of the remaindermen, because the want of consideration for the promise of the life tenants renders it unilateral and unenforceable. (*Joseph v. Sulsberger*, *supra*; *Rosseau v. Rouss*, 180 N. Y. 122.)

If the instrument were construed as an assignment or transfer by the life tenants of their right to a part of the income of the trust fund which had not accrued at the date of the instrument, it would be invalid under section 15 of the Personal Property Law. But there are no words of assignment or transfer; there are words merely of release and waiver, and these words are not sufficient to constitute a transfer. (*Central Trust Co. v. Gaffney*, 157 App. Div. 501.) Neither can the words of waiver and release be construed so as to effect a valid gift to the re-

maindermen of that part of the extraordinary dividends which, under the decision of the Court of Appeals in *Matter of Osborne* (*supra*), would belong to the life tenants, as there are no words of direct gift and there has been no delivery to the donees of the subject matter of the gift. The life tenants could not make a gift of the income which had not accrued at the time of the execution of the instrument, because it would be an attempt to make a gift to take effect in possession *in futuro*, and such a gift is void. (*Young v. Young*, 80 N. Y. 422; *Beaver v. Beaver*, 170 id. 421; *Gannon v. McGuire*, 160 id. 476.)

The recitals in the instrument disclose that it was prepared by the trustees for the purpose of exempting them from any liability for a failure to dispose of the stocks of the subsidiary companies of the Standard Oil Company, as well as to avoid the then perplexing question of apportionment of stock dividends. These recitals show that there was some doubt in the minds of the trustees as to their right to hold these stocks in the unsettled condition of the market caused by the dissolution of the Standard Oil Company, and that there was some uncertainty as to the correct method of apportionment between life tenants and remaindermen of the extraordinary dividends declared on such stocks, and that they were therefore desirous of relieving themselves from any liability for failure to sell the stocks or for the adoption of an incorrect method of apportioning the dividends. The instrument prepared by them and executed by them and the life tenants might be of some effect in a proceeding in which the life tenants would seek to hold the trustees liable for any damage sustained because of their failure to sell the stocks in the subsidiary companies; but no attempt is made in this proceeding to hold the trustees liable for any act in their capacity as trustees. It is not contended by either the life tenants or the remaindermen that the trustees in refraining from selling the stock of the subsidiary companies before the declaration of the extraordinary dividends have violated their

duty as trustees. The question is merely whether upon this accounting the trustees should apportion the extraordinary dividends between the life tenants and the remaindermen in accordance with the decision of the Court of Appeals in Matter of Osborne (*supra*), or whether, by virtue of the instrument above referred to, such extraordinary dividends should be credited to the principal of the trust. These dividends are held by the trustees in kind, and have not been distributed or apportioned between the life tenants and remaindermen.

The life tenants are entitled to their share of the extraordinary dividends unless the instrument above referred to estops them from claiming such share. They have revoked that instrument. It could not act as an estoppel, because the life tenants have not received anything under it as a consideration for executing the instrument, and its terms have not been complied with. The trustees have not been prejudiced, because there is no contention that their failure to sell the stocks is a violation of their duty, and the remaindermen parted with no valuable consideration for the release and waiver of the life tenants, therefore the latter are not estopped from revoking the instrument or claiming that part of the extraordinary dividends to which they are entitled under the decision of the Court of Appeals in Matter of Osboren (*supra*).

I will therefore hold that the instrument does not prevent the life tenants from demanding that the trustees pay to them their share of the extraordinary dividends declared upon the stock of the subsidiary companies of the Standard Oil Company of New Jersey which constitute a part of the trust fund, and that upon this accounting the trustees shall apportion such dividends between the principal and income in accordance with the rule enunciated by the Court of Appeals in Matter of Osborne (*supra*). As the papers upon the accounting do not contain sufficient facts to enable the court to make this apportionment, I will appoint a referee to make this calculation, unless the

parties within ten days from the publication of this decision agree upon the figures upon which the apportionment may be made.

Decreed accordingly.

Matter of the Petition of SAMUEL M. MEEKER to Render and Settle his Account as Successor Trustee under the Last Will and Testament of HELENA COVERT, Deceased.

(Surrogate's Court, Kings County, February, 1915.)

WILLS—PROVISIONS OF WILL FOR DIVISION OF TESTATOR'S ESTATE INTO SEVEN EQUAL PARTS—TRUSTS—WHEN GRANDCHILDREN EXCLUDED.

A will, after providing for the division of the residue of testator's estate into seven equal parts, the gift outright to three persons therein named and a devise in trust of the four remaining parts for purposes separately stated with respect to each share, continued: "Upon the further trust to designate and set apart the remaining equal part or share for the use of my son * * * to receive the rents, income and profits thereof, and apply the same to his use during his natural life, and at his death to pay, divide and distribute the capital of such last mentioned share to and among his lawful issue equally." Said son died leaving three children now surviving two of whom have each a child. *Held*, that the decree entered upon the judicial settlement of the account of the trustee should provide for the division of the fund once held for the benefit of testator's deceased son among his three children to the exclusion of the grandchildren.

PROCEEDINGS upon the settlement of the account of a successor trustee.

John C. Loud, for accountant.

William F. Ryan, for John Covert, a legatee.

Joseph A. Keenan, special guardian for Muriel R. Covert and Audrey D. Covert, infants.

KETCHAM, S.—The will under which this accounting is made provided for the division of the residue of the testator's estate into seven equal parts, the gift outright to three persons therein named and a devise in trust of the four remaining parts for purposes therein separately stated with respect to each share.

The language specifically requiring construction is as follows:

“Upon the further trust to designate and set apart the remaining equal part or share for the use of my son Francis M. Covert; to receive the rents, income and profits thereof, and apply the same to his use during his natural life, and at his death to pay, divide and distribute the capital of such last mentioned share to and among his lawful issue equally.”

Francis M. Covert, named in the last quotation, has died, leaving three children now surviving, two of whom have each a child; and the question is, whether or not the fund primarily for the use of the son Francis is now to be distributed to his three children to the exclusion of his grandchildren above mentioned, or is to be divided among his children and grandchildren concurrently?

The provision last quoted was preceded by three separate trusts, each covering a share of the estate equal to that set apart for Francis M. Covert, and in each instance there was a separate direction for the distribution of the fund at the decease of the primary beneficiary, as follows:

(a) As to one of the testator's children: “At her decease, to pay, divide and distribute the capital of such share to and among her children equally. In case either or any of her children shall then have died leaving issue surviving the said Rebecca, such issue shall have and take the share the parent would have taken if then living.”

(b) As to another of the testator's children: “At his decease to pay, divide and distribute the capital of the said last mentioned share to and among his lawful issue equally. If either or

any of his children shall then have died leaving lawful issue surviving him, such issue shall have and take the share to which the parent would have been entitled if then living."

(c) As to another of the testator's children: "At his decease to pay, divide and distribute the capital of said last mentioned share to and among his lawful issue equally, provided, however, that if either of his children shall then have died leaving issue surviving the said Michael S., such issue shall take the share the parent would have taken if then living."

There is no element of the will now requiring construction which is not found substantially in the will considered in *Matter of the Farmers' Loan & Trust Company* (213 N. Y. 168).

Here, as in that case, there are separate trusts. Here, as there, several of them are so expressed that the gift over upon death of the primary beneficiary is obviously to issue by representation. Here, as there, the provisions which clearly contemplate a stirpital enjoyment of the devise in remainder are followed by a provision which, considered alone, might be consistent only with an intention that the issue to whom the devise in remainder was made should compromise all the living descendants to take concurrently without regard to the degree of their generation.

But there the meaning which was impressed upon the word "issue" in its earlier appearance in the will was deemed to characterize its subsequent use, even though in that case, as in this, an expression which significantly qualified the word "issue" in its first employment was left out when the word was used in the provision immediately requiring construction.

In that case the court, after interpreting the word "issue" as first found in the will, said: "If that is the meaning of the word issue in that subdivision, we may fairly hold that it did not lose that meaning and take on another one in the next subdivision."

There was no argument which followed the language last

quoted and which was regarded by the court as controlling which does not with equal force and aptness embrace the question now presented.

The decree should provide for a division of the fund once held for the benefit of Francis M. Covert among the three children of his body, to the exclusion of the children of two of them.

Decreed accordingly.

KATE S. WALKER, as Administratrix, etc., Plaintiff, v. SAMUEL BRADLEY et al., Defendants.

(*Supreme Court, Cayuga Special Term, March, 1915.*)

LEASE—FOR YEARS—WHEN EXECUTRIX MAY ENFORCE LEASE FOR BENEFIT OF ESTATE—ACTION TO COMPEL SPECIFIC PERFORMANCE OF COVENANT TO CONVEY.

A lease for years and all rights thereunder belong to the personal representative of the owner of the lease and his executrix may enforce for the benefit of the estate any covenant of the lease whether it runs with the land or not.

Where a decedent at the time of his death was the owner of an unexpired lease for years, containing an optional clause for the purchase of the premises by the lessee, his executrix may maintain an action to compel specific performance of the covenant to convey.

DEMURRER to complaint.

H. F. Millard (Charles F. Lyon, of counsel), for plaintiff.

Joseph P. O'Connor, for defendants.

SAWYER, J.—This controversy has arisen over a lease made by the defendants Samuel and Ella Bradley to plaintiff's intestate, Ross Walker. The instrument leased the property for the

period of five years at an annual rental of \$175. In addition to the usual provisions, it contained an optional clause for the purchase of the land by the lessee. The lessee entered into and remained in possession of the premises until February 26, 1911, when he died intestate, leaving a widow, Kate S. Walker, and two infant children, Stuart S. Walker and Curtis S. Walker.

The widow was thereafter duly appointed administratrix of his estate and remained in possession of the premises until October 15, 1913, when she exercised the option by tendering the stipulated sum of \$1,800 to the defendants Bradley and requesting the execution and delivery to her, as such administratrix, of a deed of the premises. This was refused and she now brings this action for specific performance.

Defendants Bradley demur on the ground that there is a defect of the party plaintiff, "inasmuch as Kate S. Walker in her representative capacity has no real interest in the real estate sought to be recovered by this action, and is not the party in whom the property would vest if recovery should be made."

If this was an ordinary executory contract, made between plaintiff's intestate and the defendants Bradley, it is undoubtedly true that his interest would descend as real estate, and an action for the enforcement of the contract could only be maintained by his heirs. (*Williams v. Kinney*, 43 Hun, 1; *Palmer v. Morrison*, 104 N. Y. 132-138.)

That, however, is not the situation here presented. No executory contract of sale in the proper sense exists between the parties. Plaintiff's intestate held a lease for years which contained an option for purchase which, at his death, had not been exercised. This option was not a contract of sale, but simply a covenant running with the land (*McAdam Landl. & Ten.* [3d ed.] 465), and under well understood principles, in the absence of any limitation contained in the lease itself, it inured to the benefit of whomsoever might come in under the original lessee. (*Taylor Landl. & Ten.* § 262; *Wood Landl. & Ten.* 301;

Schouler Pers. Prop. 62; Kolasky v. Michels, 120 N. Y. 635; Probst v. Rochester Steam Laundry Co., 171 id. 584; Pers. Prop Law, § 41.)

By section 2672 of the Code of Civil Procedure leases for years are declared to be personal property and to belong to the personal representatives for application or distribution as such. It will be observed that this statute is without any limitation whatsoever. All such leases and all rights thereunder are to go to and belong to the personal representative, and this includes covenants contained in such instruments, whether running with the land, or otherwise. The ownership of a lease carries with it, of necessity, as has been above pointed out, the power to enforce same in accordance with its terms for the benefit of the estate of the decedent and those who are entitled to the proceeds thereof.

It follows, therefore, that this plaintiff, being the owner of a lease which contains an option for purchase of the land, is entitled to exercise that option for the benefit of the estate which she represents and upon the refusal of the lessors to comply with their covenant is empowered to, in her representative capacity, maintain this action for its enforcement.

The demurrer herein is overruled, with costs, with the usual leave to defendants to answer within twenty days after service of notice of judgment hereon.

Demurrer overruled, with costs, with usual leave to answer within twenty days after service of notice of judgment.

Matter of the Estate of JANE H. REED, Deceased.

(*Surrogate's Court, Saratoga County, March, 1915.*)

SAVINGS BANKS—WHERE DEPOSIT IN SAVINGS BANK EXPRESSLY STATED TO BE JOINT ACCOUNT—WHEN DEPOSIT SUBJECT TO TRANSFER TAX—TAXES.

Where a savings bank deposit of \$3,000, made in 1908 in the name of Mrs. Jane H. Reed, the decedent, and a niece, was expressly stated to be a joint account with right of survivorship payable to either or to survivor, the full and complete ownership of the whole deposit was not intended to vest in the niece until she became the survivor at the death of decedent in 1914, and the deposit is subject to a transfer tax.

Where decedent, shortly after making a deposit of \$3,000 in a savings bank in 1910 "In account with Mrs. J. H. Reed or Mrs. Sarah M. Clute, her sister," informed said sister of the fact and showed her the pass-book, there was a gift *inter vivos* of one-half of the deposit, thus creating a tenancy in common, and one-half is subject to a transfer tax.

Where decedent, soon after making a deposit of \$3,000 in a savings bank in 1911 in the name of "Mary J. Reed in trust for Dow S. Clute," showed the bank book to Dow who was an infant, and to his father, and told them that she intended it to be for the benefit of the infant and "that it was and was to be his and to belong to him" there was a present transfer by way of a gift *inter vivos* and the same was not subject to a transfer tax, it being conceded that Jane H. Reed and Mary J. Reed are the same person.

A deposit made by decedent in 1910 "In trust for her nephew Fred S. Clute" amounted to a gift *inter vivos* and the title to the deposit passed at that time and was not subject to a transfer tax.

PROCEEDING to determine transfer tax questions in relation to certain savings bank deposits.

Burton D. Esmond, for comptroller.

George B. Lawrence, for executors and beneficiaries.

OSTRANDER, S.—This is a proceeding to determine transfer tax questions in relation to certain savings bank deposits.

Deceased died at the town of Malta September 29, 1914.

On July 6, 1908, she deposited in the Albany Savings Bank

\$3,000, the deposit standing "Albany Savings Bank in account with Mrs. Jane H. Reed and Jennie C. Gray, her niece. Joint account with right of survivorship payable to either creditor or to survivor."

January 10, 1910, she desposited \$3,000 in the National Savings Bank of Albany, the account being entered in the name of said bank "In account with Mrs. J. H. Reed or Mrs. Sarah M. Clute, her sister."

On October 6, 1910, she deposited \$3,000 in the Albany County Savings Bank "In trust for her nephew Fred S. Clute."

On July 8, 1911, she deposited \$3,000 in the Albany County Saving Institution in the name of "Mary J. Reed in trust for Dow S. Clute."

Jane H. Reed and Mary J. Reed are conceded to be the same person.

Chapter 220 of the Tax Law, in relation to transfer tax, provides that a tax be imposed upon the transfer of property "by deed, grant, bargain, sale or gift, made in contemplation of the grantor, vendor or donor or intended to take effect in possession or enjoyment at or after such death."

The last of these deposits was made over three years before Mrs. Reed's death and no facts are shown warranting the inference that any of them were made in contemplation of her death within the meaning of those words as defined by the courts.

The next inquiry is whether the transfers to the various beneficiaries, under the circumstances, were intended to take effect in possession or enjoyment at or after her death. The various deposits will be considered separately.

It appears from the affidavits filed that, shortly after the deposit of July eighth, decedent informed Mrs. Gray that she had made the same, the amount of it and the manner in which she had deposited the money and showed the pass-book to Mrs. Gray. This deposit, it will be noted, was defined in the pass-

book as a "joint account with right of survivorship, payable to either creditor or survivor."

This brings it within the provisions of chapter 369, Laws of 1914, section 249, subdivision 3, which declares that such a deposit "shall become the property of such persons as joint tenants." The provision has been in force since 1907, prior to this deposit.

In *Bonnette v. Molloy* (153 App. Div. 73), it was said that if the moneys deposited in form similar to Mrs. Gray had been so deposited after this enactment, there could be no question but that the survivor would be entitled to the fund. Prior to this enactment there had been frequent difficulty in ascertaining the intentions of the parties in such case in respect to joint tenancy and there had been great reluctance to find that the depositor intended to create such joint tenancy of the fund with a right of survivorship except upon very clear and cogent evidence. But the latter part of said section 249, as amended in 1914, provides that the deposit in such form shall be conclusive evidence of the intention of both parties to vest the title to such deposit and all additions in the survivor.

In this case we have not only the statutory declaration but very clear expression of the intent of all the parties to the contract. In most of the recorded cases the controversy has been with reference to the ownership of the fund after the death had occurred, while adjudication as to when the complete ownership finally vested for purposes of the Transfer Tax Law has not been common.

It will be further noted that these joint tenancies in personal property, which it is conceded may exist, are not of the same quality as estates by the entirety in lands which can exist only between husband and wife who are in such case considered in law as one and the same person.

In *Matter of Pitou* (79 Misc. Rep. 385), Surrogate KETCHAM held that even in case of joint tenancy the survivor became the

owner of his associate's part because his associate died, and when he died, and that the transfer for such part was "intended to take effect in possession or enjoyment" upon the death of such tenant and was taxable.

Judge KENT, in his Commentaries (Vol. 4, p. 360) says, the whole estate or interest held in joint tenancy whether it was an estate in fee, or for life, or for years, or was a personal chattel, passed to the last survivor and vested in him absolutely. It passed to him free and exempt from all charges made by the deceased co-tenant.

The consequence of this doctrine is that a joint tenant cannot devise his interest in the land; for the devise does not take effect until after the death of the deviser and the claim of the surviving tenant *arises in the same instant* as that of the devisee and is preferred.

It will be noted that the addition to section 249 of the Banking Law above noted provides that in such case it is to be conclusively inferred that both parties intended to vest the title in the *survivor*. Until the death of one there can be no survivor and consequently no complete vesting of title or "taking effect in possession or enjoyment."

The moneys were originally Mrs. Reed's. What she gave to Mrs. Gray was not an immediate and absolute right to all the money but a right to the whole of it in case she became the survivor, and subject to a right in each to draw the whole deposit during their joint lives. The full and complete ownership of the whole was not intended to vest in Mrs. Gray until she became the survivor at the death of Mrs. Reed.

This deposit is therefore taxable.

As to the deposit for Mrs. Clute:

It appears that shortly after the deposit in January, 1910, the deceased informed Mrs. Clute that she had deposited said moneys in the form set forth and showed her sister, Mrs. Clute, the pass-book containing said account. This deposit made to

Mrs. Reed or Mrs. Clute is of the same effect as if made to Mrs. Reed and her sister. (Clary v. Fitzgerald, 155 App. Div. 659.)

In this case of Mrs. Clute, there is no word in relation to a trust or survivorship in the form of this deposit, nor is it in form to be deemed a joint tenancy under section 249 of the Banking Law above quoted, since it is not in terms to be paid to the survivor. The fact that Mrs. Reed showed the book to her sister in this form does not show any intention with regard to it other than its form would indicate.

In Corcoran v. Hotaling (164 App. Div. 75), it was held that a deposit in this form was not inconsistent with an intention to create a joint tenancy in the fund where there was sufficient proof of such intention, but in this case at bar no such intention appears outside of the words on the bank-book. These words import a gift *inter vivos* of one-half of the fund, thus creating a tenancy in common. This leads to the conclusion that one-half of this fund is taxable.

The deposit made in trust for Fred S. Clute by the deceased seems to fall within the rule of Matter of Totten (179 N. Y. 112); Matter of Pierce (132 App. Div. 469); Stockert v. Dry Dock Savings Institution (155 id. 123); Hessen v. McKinley (Id. 496), where it was held that when notice of the trust form of the deposit was given to the beneficiary the trust became irrevocable. The transaction amounted to a gift *inter vivos*, the title passed at the time and the deposit was not taxable.

Concerning the Dow S. Clute deposit:

Very soon after making the deposit Mrs. Reed showed the book to Dow, who was an infant, and to his father, and told them that she intended it to be for his benefit, and "that it was and was to be his and to belong to him." If, as she expressed her intentions, "it was his" when she showed him the pass-book, his ownership was not postponed, and there seems to be every element required for a gift *inter vivos*. This was then a present transfer, and was not taxable.

The question of exemption from taxation of any of these matters by reason of relationship of the beneficiary to the deceased, or by reason of the amount passing to the beneficiary, is not considered in this opinion, but will be determined upon the adjustment of the tax.

Decreed accordingly.

**Matter of Proving the Last Will and Testament of AMELIA
KING, Deceased.**

(Surrogate's Court, Bronx County, March, 1915.)

**WILL—PROOF OF DUE EXECUTION AND OF QUALIFICATIONS OF TESTATOR—
BURDEN OF PROOF AS TO TESTAMENTARY CAPACITY.**

Before a propounded document can be admitted to probate as a last will and testament there must be shown to the satisfaction of the surrogate not only that the same has been executed with the formalities prescribed by section 21 of the Decedent Estate Law (Laws of 1909, chap. 18; Consolidated Laws, chap. 13) but also that the person alleged to have executed the same was free from the disqualifications set forth in section 10 of the Decedent Estate Law, as to real estate, and was possessed of the qualifications prescribed by section 15 of the Decedent Estate Law as to personal estate. Among these is that to the effect that the alleged testator must be of sound mind.

The burden of proving testamentary capacity, like the burden of proving the formalities of execution, is upon the proponent.

Probate of will denied upon the ground that the decedent at the time of the execution of the alleged will did not possess testamentary capacity.

PROCEEDING upon the probate of a will.

Anthony J. Romagna, for petitioner.

William L. Allen, for contestant.

Charles A. Furthman, for Casper Stocker and others.

Frost, Daring & Warner, for Eliza Laible.

Anthony J. Griffin, special guardian for unknown infants and incompetents, if any.

Ely Neumann, special guardian for Lillie Schrauf.

SCHULZ, S.— The alleged will of the decedent is offered for probate by her niece who is nominated and appointed therein as executrix thereof. The proponent under the terms of the propounded document, if established as the valid will of the decedent, would receive the sum of \$7,500. The instrument also contains a provision in favor of a daughter of the decedent in the sum of \$2,000, and then a bequest and devise of the rest, residue and remainder of her property to certain of her nephews and nieces named therein. It is conceded upon the record that the property of the decedent, real and personal, is of the value of about \$12,150, so that the proponent is the largest beneficiary. In her petition for probate she sets forth as all of the heirs and next of kin of the deceased the daughter of the deceased named in the will, if she be living, and if she be dead, her personal representatives, etc., and also the nephews and nieces who are mentioned as residuary legatees in the will. No reference is made to the sister of the decedent, although it is claimed that at the time the alleged will was executed by her she mentioned her sister. The daughter was served by publication, and upon affidavit submitted by the petitioner, which tended to show reasonable effort to ascertain the residence of the daughter of the decedent and a failure to find it, mailing of the citation was dispensed with. Pending the submission of proofs, the sister of the decedent applied for an order bringing her into the proceeding as a party and allowing her to appear. Such order was made and she thereupon appeared and filed objections in the

usual form. All of the adult nephews and nieces mentioned in the will joined in filing objections in which they raised the usual issues and also specifically averred that at the time the said document purports to have been signed by the decedent she was in a dying condition and unable and incompetent to make a will; that the same was procured from her by undue influence exercised over her by the proponent or some other person who caused to be inserted therein a bequest to the said proponent of \$7,500, and that the said decedent was unable to comprehend the purport of the same. The infant niece through her special guardian also filed objections of substantially the same tenor. Subsequently, all of these objections were withdrawn, and thereupon the testimony was taken as upon an uncontested will. Pending the admission of the will to probate, the daughter who had been served by publication applied to the court for an order reopening the proceeding and permitting her to come in and file such objections to the probate of the instrument as she might be advised. This application was granted and the daughter thereupon filed objections to the will. Upon the hearing the testimony which had been theretofore taken was by stipulation read into the record on the contested proceeding.

The decedent was about sixty-two years of age. On or about December 4, 1913, she received serious burns which had been termed by the medical witnesses third degree burns and by one physician as third and fourth degree burns. On January 8, 1914, she became an inmate of the City Hospital on Blackwell's Island, having come to that hospital from Lebanon Hospital. She remained in the City Hospital from that date to February ninth when she died. The disputed document is alleged to have been executed by her at the hospital on the 5th day of February, 1914, four days before her death, and at a time when the evidence clearly shows that she was in a critical condition, seriously ill with the chances of her recovery exceedingly doubtful. The will therefore comes within the category of so-called death-bed

wills and while the fact that a will is made at a time when the alleged testatrix is upon her death-bed does not of itself create a presumption of invalidity (*Matter of Seagrist*, 1 App. Div. 615, 620), it should make the surrogate more careful in scrutinizing the document than if it was executed by a person in full possession of bodily health, attending to the normal duties of everyday life. This I believe is generally recognized by the courts. (*Matter of McGraw*, 9 App. Div. 372, 380; *Rollwagen v. Rollwagen*, 63 N. Y. 504, 518.)

The physical appearance of the propounded document is such as to warrant the most careful consideration. The name of the niece who is most abundantly provided for in, who is the executrix nominated by, and who the testimony shows was present at the execution of, the will, is Amelia Cook. The propounded document is signed "Amelia," being the first name of the decedent and also of this legatee, and then appear the letters "Co" over which are written the letters "K-i-n-g," the letters "Ki" of the name "King" being superimposed upon the letters "Co." No explanation of this unusual circumstance is offered unless it be in the testimony of the attorney who attended at the execution of the alleged will, hereinafter referred to.

The two attesting witnesses to the document were nurses in the employ of the City Hospital, and it is claimed that the instrument was executed before them and also in the presence of the proponent and the lawyer who prepared the document. Upon the direct examination, one of these nurses testified positively that she saw the testatrix sign the instrument; that the decedent spoke in German a great deal and the proponent interpreted to the attorney preparing the will; that the witness at the time of the execution recalled the instructions that were given because she understood German but could not remember any of them when testifying; being recalled at the same hearing she modified her testimony by stating that she was looking at the decedent part of the time while the latter was writing

her name, but that her attention was attracted to other things in the meantime, and that the paper was read aloud to the decedent and to her before the decedent and the witness signed. At a subsequent hearing she stated that she left the bedside when the decedent began to write, and that when she came back the proponent asked her to get another witness which she did; that the attorney then pointed to the signature and asked the decedent whether it was her signature; that he also asked her whether it was her last will and testament and whether she was willing to have the witnesses sign as witnesses and that she responded in the affirmative; that she is sure she did not see decedent write; that she could not see what she was writing; that she saw her arm moving. This nurse was assigned to the ward in which the decedent was confined. The other nurse was in an adjoining room and was called in by the first mentioned nurse. The second nurse states that she did not see the decedent sign the instrument; that she was not in the room when the instructions were given; that she did not hear the will read; that the decedent did not say anything about her signature and that she did not remember her acknowledging her signature or saying "this is my signature," and that in answer to the questions whether she was satisfied with all that was in the will and whether she was willing to have the witness and the other nurse sign, the decedent said "yes." At a subsequent hearing the witness testified that the attorney pointed to the signature of the decedent and asked the decedent if it was her signature and that the latter answered in the affirmative. The attorney who prepared the will and was present at its execution also testified without objection. He says that the signature was acknowledged in the presence of both witnesses and in his testimony is found a possible explanation for the unusual appearance of the subscription to the alleged will. He testifies that the decedent started to sign and became weak, and that then he suggested that the proponent help her. Being recalled subsequently, his

testimony was to the effect that the decedent said that she was sick and asked the proponent to help her.

The testimony of the two attesting witnesses above referred to seems to be contradicted by the attestation clause. This attestation clause is not in printed form, but is written in long-hand and it recites among other things that the document was "then and there signed by Amelia King in the presence of us" and is signed by the two attesting witnesses.

I think it is clear from the testimony of the witnesses referred to that the propounded document was not signed by the testatrix in the presence of both of the witnesses. If, therefore, the statute was complied with at all, it was complied with by the decedent acknowledging the subscription to the will to have been made by her to each of the attesting witnesses. The unusual appearance of the subscription would naturally lead to the inquiry whether the signature was due to the assistance of the proponent or to her control. (*Matter of Kearney*, 69 App. Div. 481.) I think, however, that the subsequent acknowledgment of the signature and the adoption thereby of the same by the decedent, together with the evidence as to the making of the signature, is sufficient to justify a finding that the formalities of the statute have in that regard been complied with. (*Knapp v. Reilly*, 3 Dem. 427, 431; *Van Hanswyck v. Wiese*, 44 Barb. 494; *Robins v. Coryell*, 27 id. 556; *Chaffee v. Baptist Missionary Society*, 10 Paige, 85, 92; *Sisters of Charity v. Kelly*, 67 N. Y. 409.) I should hesitate to base a finding that such an acknowledgment was made upon the testimony given by the two nurses standing alone, and which they gave after they both testified on the first hearing, upon which occasion they did not testify to such acknowledgment, but I find in the testimony of the attorney who prepared the will, when he first testified in the proceeding, a statement to the effect that such acknowledgment was made. With his testimony corroborating the testimony of the nurses before me, I reach the conclusion

that the formalities of execution were complied with, assuming that the decedent was competent to comply with them.

I pass, therefore, to a consideration of the testimony bearing upon the mental condition of the decedent and the influences surrounding her at the time of the alleged execution of the document. The testimony of the subscribing witnesses and the attorney who prepared the will has already been referred to and is to the effect that the decedent was rational. Among the witnesses produced by the contestant were three who had seen the decedent on the day the will was executed. One of these witnesses was an attorney at law favorably known throughout this county, who appeared to be entirely disinterested and whose testimony has not been contradicted or impeached in any way. He testifies that on the 4th day of February, 1914, the day before the alleged will was made, the proponent called upon him and that he then made an appointment with her to attend at the City Hospital on Blackwell's Island on the following day for the purpose of preparing the last will and testament of this decedent; that on the following day at about noon he attended at the bedside of the decedent in company with the proponent; that the decedent was lying in a single bed; that the color of her skin was grayish, her teeth clenched and her lips drawn tightly over her teeth and when he spoke to her he could hardly get an answer that was audible; that she uttered sounds which came at distinct intervals of time after a minute or two and that he was present about twenty to twenty-five minutes; that he asked her the names of relatives and got no answer to the question, but that she answered "yes" at some times and at other times "no" when the proponent put questions to her suggesting names; that he asked her whether she wanted him to draw her will and after some hesitation she said "Yes," and upon again asking her she replied in the German language "Morgen" meaning to-morrow, and that her acts and declarations as testified to by him impressed him as being

irrational. He further says that he then told the proponent that he would not draw the decedent's will and did not think that she was capable of executing a will; that he called upon the house surgeon and conferred with him, the conversation itself being excluded on objection, and that he then left without drawing the will in company with the proponent. Most of the testimony of this witness was taken over objections made thereto by the proponent or some of the legatees or both on the ground, among others, that it involved communications between an attorney and his client and was thus barred by the provisions of section 835 of the Code of Civil Procedure. My opinion is that his testimony did not involve such communications for the reason that the relationship of attorney and client was not established and even if established the communications were not privileged because made in the presence of a third person, namely, the proponent. (*Baumann v. Steingester*, 213 N. Y. 328, and cases cited.)

The attorney who drew the will states that he did not know the proponent but that a telephone message was received at his office on February fifth before three o'clock P. M., making an appointment for him with her, and that she arrived at his office at two-thirty, his office being in New York city, and that he thereupon went with her and arrived at the ward where the decedent lay ill at about ten minutes to four P. M. His testimony further is that the proponent did not inform him that she had been at the hospital with another lawyer, and that when he entered the hospital he told the persons at the office that he desired to draw a will, but not whose will he desired to draw. The proponent was not called to contradict this testimony and the court must, therefore, accept as proved, that the proponent, after having attended with an attorney to draw this decedent's will, and having been advised by the attorney after he had asked questions of the decedent, that in his, the attorney's, opinion the decedent was not capable of making a will, she hastened from

the hospital and sought another lawyer to prepare the decedent's will, whom she did not advise in any way of what had occurred, so that the latter might have conferred with the house physician in charge and taken more precautions, as he undoubtedly would have done had he known the facts, to establish that the decedent was competent to execute the instrument. It does not follow that, because these occurrences took place, the decedent was of unsound mind at the time she executed the will, but they throw a light upon the method employed by the proponent to bring about the preparation of this will which I think was, to say the least, indiscreet.

The house physician in charge of the institution in which the patient was confined was also called by the contestant, and his testimony is that he saw her probably every day; that on the twenty-ninth of January she had a chill and developed bronchopneumonia, and on February fourth her condition was such that when spoken to she had to be aroused and her answer was "yes" and "no" for the same question; that when spoken to there was no response, and that she was ordered to be put on a waterbed, and was put on a waterbed at nine-thirty A. M. on February fifth to prevent her injuring herself. He further says that at one-thirty o'clock on February fifth, which it will be observed was only a few hours prior to the time when this alleged will was made, and between the time the first attorney had declined to prepare the alleged will and its subsequent preparation, he made a thorough examination of the deceased and made the diagnosis of pneumonia; that she had to be aroused; that there was no response, only muttering, and no reply to questions put to her; that she could not answer and was in a stupor, and that she was not in such a mental state that she could recall the objects of her bounty or the nature and extent of her property.

The testimony of the physician in immediate charge of the ward where the deceased was confined was not directed speci-

leally to the mental condition of the patient, but rather explanatory of the bedside notes and charts and her general condition. Among the other witnesses called were two physicians who testified as experts, one for the proponent and the other for the contestant. Neither of these gentlemen had ever seen the decedent and their answers were based entirely upon hypothetical questions founded upon the hospital record that was in evidence. The testimony of the witness for the contestant is that in his opinion, based upon the hospital records, the decedent became mentally incapable of making a testamentary disposition of her property on February 2, 1914, and the testimony of the witness for the proponent is that he could not tell the mental condition of the deceased from the hospital record upon any particular day prior to the time the record states the patient became delirious, which was the day after the alleged will was made. Both physicians agree that the best method of determining the mental condition of a person at a given time is by personal observation. I consider the testimony of the witnesses who actually saw this decedent upon the day when the will was executed of the greatest importance and have for that reason referred to it at some length. It is unnecessary to analyze the voluminous testimony of the other witnesses.

There is no evidence to indicate why the decedent should prefer her niece, the proponent, over her own daughter. There is testimony by the attorney who prepared the will to the effect that the proponent herself made some reference to services she had rendered for the decedent, but this is clearly a self-serving declaration made by an interested party which the court would have stricken out if requested so to do and to which very little, if any, weight can be given. The same witness also testifies to a statement made by the decedent herself, to the effect that the proponent had taken care of her. This is so vague and indefinite, however, that it is difficult to base any finding upon it. If the proponent did render services to the decedent for

many years and did take care of her, it seems to me that more convincing proof of such facts might have been produced. An old friend and neighbor of the decedent was upon the stand. She had known her for over thirty years, but she does not testify to such facts, and indeed was not examined as to them.

It is contended that the daughter did not often visit her mother, and from this is argued that the relationship between the decedent and her daughter was not pleasant; but I think that the reason for the absence of the daughter from the mother's home has been explained. It is not necessary to refer to it at length in this opinion. Suffice it to say that there appears to have been a reason which to the decedent seemed sufficient why the decedent did not wish to have her daughter call upon her frequently and kept her more or less at a distance. Under the circumstances, I do not think that this state of facts was an indication that the affection which this mother had for her daughter was less strong than that which usually exists between persons so closely related, and it certainly was no reflection upon the daughter. If anything, the facts disclosed would warrant the assumption that the affection of the decedent for her daughter was strong. As late as October, 1913, she wrote to her in endearing terms, as appears from writings in evidence.

The burden of proving that the propounded document is the valid last will and testament of the decedent upon the *factum* and the issue of testamentary capacity is upon the proponent. Before a will is admitted to probate, the evidence should be of such a nature and of such weight and probative force that the court on its conscience can say that the document is what it purports to be; not alone that the statutory formalities of execution were complied with, but that the decedent had testamentary capacity. (Code Civ. Pro. § 2614, formerly Code Civ. Pro. §§ 2622, 2623; Matter of Goodwin, 95 App. Div. 183; Matter of Schreiber, 112 id. 495; Matter of Lissauer, 5 N. Y. Supp. 260; Matter of Gedney, 142 id. 157; Rollwagen v. Rollwagen,

63 N. Y. 504; *Matter of Cottrell*, 95 id. 329, 336; *Matter of Martin*, 98 id. 193, 196.) I am aware of the decision in *Matter of Kindberg* (207 N. Y. 220), to the effect that: "Undue influence is an affirmative assault on the validity of a will, and the burden of proof does not shift, but remains on the party who asserts its existence." But I do not read that opinion to establish the principle that the same is true of the issue of testamentary capacity. Section 21 of the Decedent Estate Law, being Laws of 1909, chapter 18, and constituting chapter XIII of the Consolidated Laws, sets forth the statutory formalities that must be observed in the execution of a will; but even if these formalities are observed the executed document is not a will valid to pass real and personal property unless it is executed by *one who may devise real estate and bequeath personal property*. Section 10 of the Decedent Estate Law provides: "All persons, except idiots, *persons of unsound mind* and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this article," and section 15 of the Decedent Estate Law provides: "Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, *of sound mind and memory, and no others*, may give and bequeath his or her personal estate, by will in writing." The statute thus makes a condition precedent to the execution of a will, that the testatrix be of sound mind, and hence the burden of proving that fact is upon the proponent just as it is incumbent on her to prove the formal steps taken in the execution of the instrument. This, I think, constitutes an important distinction between the issue of undue influence and that of testamentary capacity.

In the case now before me the evidence does not convince me that this testatrix was of sound mind on February 5, 1914. On the contrary, even if the burden of proof were upon the contestant on that issue, I would, on the evidence, hold that she had sustained that burden.

I am, therefore, of the opinion that at the time this alleged will was executed the testatrix was not possessed of testamentary capacity, and that the will for that reason should not be admitted to probate as her valid last will and testament. .

Had I reached a contrary conclusion, however, I would still hesitate to permit this document to go to probate. A consideration of the conditions under which this will was executed; the physical condition of the decedent practically undisputed; the fact that the chief beneficiary was advised by the first attorney, whom she requested to draw the will, that in his opinion the testatrix was incompetent; her haste in procuring another attorney when the last statement made by the decedent to the first attorney was that she would make her will the next day; her failure to advise him of what had occurred a few hours before; the fact that it was her hand which guided, if it did not control, the hand of the decedent when her name was subscribed to the instrument, under the terms of which the decedent's only child would receive but \$2,000, whereas the proponent would receive \$7,500, and the remaining nephews and nieces almost \$2,700; all of these facts would cause me grave doubt as to whether the propounded document was the expression of the free desire and will of the decedent or was due to an influence exerted upon her, which in her weakened condition supplanted her will with the will of another and constituted undue influence. (*Marx v. McGlynn*, 88 N. Y. 358, 371; *Children's Aid Society v. Loveridge*, 70 id. 387, 394, and cases cited *supra*.)

A further consideration of this question, however, is not necessary in view of the conclusion which I have reached upon the issue of testamentary capacity.

In accordance with the views expressed it follows that probate of the propounded document must be denied.

Probate denied.

Matter of Proving the Last Will and Testament of MARY V.
McCUSKER, Deceased.

(Surrogate's Court, New York County, March, 1915.)

WILLS—TESTAMENTARY CAPACITY—WHEN TESTATRIX NOT SUBJECT TO
UNDUE INFLUENCE—EVIDENCE—WHEN WILL ENTITLED TO PROBATE.

If a testatrix at the time of making her last will is capable of appreciating the value of her property, and can recollect her relatives and any possible claimants upon her bounty for a sufficient length of time to enable her to form a rational judgment concerning these elements, and if she can appreciate the scope and bearing of all the provisions of her will, she has testamentary capacity.

Testatrix, about three months before her death, executed her last will by which after various small legacies to several relatives, friends and institutions she gave the residue of her estate amounting to about \$80,000 to her real estate agent and her attorney, who did not draw the will, in equal shares and named both of them as executors. After explaining in the will why she left nothing to certain relatives, and after directing that nothing should go to certain other relatives because of the trouble they had caused her, she embodied in the will the following: "My other relations, if any are alive, I have not seen or heard from in many years. They never manifested any interest in me nor called upon me in sickness or at any other time. They had no interest in me, nor I in them." This statement in the will was fully borne out by the testimony. The probate of the will was contested by second and more distant cousins of decedent on the ground of testamentary incapacity and undue influence. *Held*, upon consideration of the evidence, that testatrix understood the scope and nature of her will, was legally competent and capable when she executed it; that it expressed her free and voluntary act; that she was not the subject of undue influence in the execution thereof, and that it was entitled to be admitted to probate.

PROCEEDING upon the probate of a will.

James F. Donnelly (John T. Smith, of counsel), for
proponent.

Henry Braun, Jr., for contestant Agnes McManus.

Frank M. Patterson, for Bridget C. Dowling, as general guardian of John W. Farley and Richard Farley.

James M. Tully, for contestant Jane Jackson.

Sykes, McCole & Potter, for contestant Leona J. Kip.

Joseph Fennelly, for contestant Mary I. Keirnan.

W. W. Irwin, for other contestants.

Don R. Almy, of counsel, for all contestants.

Frank T. Fitzgerald, special guardian.

James M. Donohue, special guardian for Helen, John, Elizabeth, William and Mary Rooney.

Thomas J. L. McManus, for Franklin Ryan.

COHALAN, S.— Mary V. McCusker died September 17, 1913, at the age of seventy-four years. Three months before her death she executed the paper offered for probate herein as her last will and testament. The value of her estate is said to be about \$100,000. The will gives various small legacies to several relatives, friends and institutions, and the residue, which may amount to about \$80,000, is divided equally between the testatrix's real estate agent, James J. Etchingham, and her attorney, John A. Rooney, both of whom are named as executors.

The contestants are second and more distant cousins. After explaining in the will why she left nothing to the McCusker relatives and after directing that nothing should go to the Ryan relatives because of the trouble they had caused her, the testatrix stated in the sixth clause of the will: "My other relations, if

any are alive, I have not seen or heard from in many years. They never manifested any interest in me nor called upon me in sickness or at any other time. They had no interest in me, nor I in them." The testimony fully bears out this provision of the will.

The deceased had been a public school teacher in New York city for about forty-five years, until she was retired on a pension February 1, 1899. Her mother died in 1877. Her sister Sarah was an inmate of Bloomingdale Hospital and died there November 11, 1904, of chronic melancholia. On June 7, 1898, after a few months' illness, the deceased was legally committed to St. Vincent's Retreat for the Insane at Harrison, N. Y. She went there voluntarily and was aware of her condition. At the time of her commitment she was very much depressed and despondent and had hallucinations. She quickly improved however, and was permitted to go home October 27, 1898. She was again at St. Vincent's Retreat as a voluntary patient from April 26, 1906, to September 26, 1906, and from June 11, 1912, to May 31, 1913. Several nurses of that institution testified to acts of the testatrix while she was at St. Vincent's, which they characterized as irrational. Most of the so-called irrational acts were only eccentricities. Whatever mental aberration they indicated was temporary in character. Dr. Brooks, who was the physician in charge of St. Vincent's Retreat, and who had attended the testatrix while she was an inmate there, was the contestants' expert on the question of testamentary capacity. He said that in his opinion Miss McCusker was insane in March, 1913, and was not competent to make a will June 9, 1913, although he admitted that she was sane in February, 1913, and that he had asked her to make a will at St. Vincent's at that time.

In 1901 the testatrix met James J. Etchingham, one of the executors and residuary legatees named in the paper propounded. Etchingham subsequently acted as her real estate

agent, and up to about 1907 he collected and turned over to her the rents of her real property and transacted the business incident thereto under her direction. Her letters written during this period show that she was undoubtedly competent and capable in business matters. In 1908 the testatrix became involved in litigation with a Margaret V. Ryan, with whom she had lived a year or two before. Etchingham recommended Rooney to Miss McCusker, and he acted as her attorney in the action against Mrs. Ryan. Rooney conducted the action successfully and secured from Mrs. Ryan restitution of the houses and other property that Miss McCusker claimed had been taken from her. During the pendency of the Ryan-McCusker litigation Rooney visited the testatrix weekly. The Ryan litigation seems to have been her chief interest and her main topic of conversation during the last five years of her life. After the termination of the suit she gave Rooney full power of attorney to look after her financial affairs. Thereafter he was accustomed to draw checks and attend to various other details which the testatrix had formerly attended to personally.

The will was prepared by another lawyer, an acquaintance of Rooney. The draftsman was given full and explicit instructions by the testatrix herself on the evening of June 6, 1913, at No. 210 East Forty-ninth street. An appointment was made for June 9, 1913, and Miss McCusker's attending physician was asked to be there to witness the will. On the evening of June 9, 1913, the will was executed. All the necessary formalities were complied with. The witnesses were the draftsman (an attorney) and the physician. The draftsman talked with Miss McCusker about various matters for about an hour while they waited for the arrival of the physician. The testimony of the subscribing witnesses leaves no doubt in my mind as to her competency at the time. Her physician had been attending her for nine days, and he testified that during that time she was able to walk about

with assistance and that at the time she executed the will she was of sound and disposing mind and memory.

The testatrix died three months after the will was executed. She was stricken with cerebral apoplexy in August, 1913, and died about a month later. During the last four or five years of her life the testatrix had been in ill health caused generally by the decline accompanying "old age." She suffered from arterio sclerosis, Bright's disease and muscular weakness of the heart. These ailments had been slowly progressing for several years.

The paper propounded is substantially the same as the will executed by Miss McCusker August 28, 1909, four years before her death and only a year or two after she met Rooney. A codicil was executed in November, 1910, which made some minor changes in the will of 1909 and confirmed the provisions of that will giving the residuary estate to Rooney and Etchingham.

The testatrix had a right to will her property as she desired. If, at the time of executing the will, she was capable of appreciating the value of her property and could recollect her relatives and any possible claimants upon her bounty for a sufficient length of time to enable her to form a rational judgment concerning those elements, and if she could appreciate the scope and bearing of all the provisions of her will, she had testamentary capacity. I am of opinion that the testatrix understood the scope and nature of her will and was legally competent and capable when she executed it. I am also of opinion that the paper propounded expresses her free and voluntary act, and that she was not the subject of undue influence in the execution thereof.

The paper propounded is entitled to probate as the last will and testament of the deceased.

Probate decreed.

Matter of the Estate of JOSEPH PULITZER, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

EXECUTORS AND ADMINISTRATORS—ELECTION BY EXECUTOR AND TRUSTEE TO CLAIM REGULAR COMMISSIONS—WHEN RENUNCIATION OF MONEY LEGACY DOES NOT CALL FOR REVOCATION OF LETTERS TESTAMENTARY.

The fact that an executor and trustee elects to claim his regular commission by filing with the surrogate a renunciation of a money legacy given him in lieu of commissions as executor and trustee does not call for the revocation of letters testamentary to him on the ground that under the terms of the will he has, by rejecting the bequest, disqualified himself as executor and trustee.

PROCEEDING for the revocation of letters testamentary and for the removal of Frederick N. Judson, one of the executors and trustees of the estate of Joseph Pulitzer.

Arthur C. Train, guardian *ad litem* (appointed in Supreme Court action) of Ralph Pulitzer, Jr., and for Seward Webb Pulitzer.

George C. Holt (Charles P. Howland, of counsel), for Frederick Newton Judson.

COHALAN, S. This is a proceeding for the revocation of letters testamentary and for the removal of Frederick N. Judson, one of the executors and trustees of the estate of Joseph Pulitzer. The proceeding is brought on behalf of two infants interested in the estate by a guardian *ad litem* appointed for them in an action pending in the Supreme Court for a construction of the Pulitzer will and for the settlement of the accounts of the executors and trustees of the estate. In the Supreme Court action the right of Frederick N. Judson to commissions as executor and trustee of the estate is, or shortly will be, at issue.

Judson was appointed an executor and trustee by a codicil of

the will of Joseph Pulitzer and letters testamentary were duly issued to him and the other executors September 4, 1911. Another codicil to the will bequeathed Judson the sum of \$50,000 in lieu of commissions as executor and trustee, except certain commissions upon income, which he was permitted to receive. Judson is a practicing lawyer in St. Louis. He has had charge of the Pulitzer properties in Missouri and has been diligent and active in his duties as executor and trustee. At an early stage in the administration he determined to renounce the legacy of \$50,000 and to elect to take his regular commissions. This decision was practically approved by the other executors and trustees, and the formal renunciation was filed in the surrogate's office on or about November 26, 1912. At the time of filing said renunciation section 2730, Code of Civil Procedure, provided:

"Where the will provides a specific compensation to an executor or administrator he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, he renounces the specific compensation."

The statute contains substantially the same provision applicable to trustees. Code Civ. Pro. § 3320.

The guardian *ad litem* of two infant life tenants of the residuary estate has petitioned this court as a "friend" of the wards and prays for the revocation of the letters heretofore issued to Judson on the ground that under the terms of the will he has disqualified himself as executor and trustee by rejecting the specific compensation bequeathed him.

The only provision of the section of the Code governing the removal of an executor or trustee that could possibly have any bearing on the ground for removal urged herein is subdivision 1 of section 2569, Code Civil Procedure, which is as follows:

"Where the respondent was, when appointed or when letters were issued to him, or has since become incompetent, or disqualified by law to act as such, and the grounds of the objection did not exist, or the objection was taken by the petitioners, or a

person whom he represents, before the letters were granted or the appointment made."

To reach a determination on this question requires an examination of the second and third codicils to the will of the decedent.

The second clause of the second codicil, dated January 17, 1910, provides as follows:

"I nominate and appoint Frederick Newton Judson, of St. Louis, lawyer, and J. Angus Shaw, now in the office of the New York World, both executors and trustees of my said will, in addition to the executors and trustees named in my said will or in the codicil dated the twenty-third of March, one thousand nine hundred and nine, with like force and effect as if they had been originally named as executors and trustees, *provided, however, that the said Frederick Newton Judson shall only act as executor and trustee until my son Joseph reaches the age of thirty years, and I direct that the power of removal given under my said will shall not extend to the executors and trustees appointed by this codicil.*"

The third clause of the codicil provides as follows:

"In case the said Frederick Newton Judson and J. Angus Shaw, or either of them, shall decline to act as executors and trustees, or, having so acted, shall either by death or disability or of his own wish, cease so to act, then I nominate and appoint Robert Weeks De Forest, of New York, lawyer, as executor and trustee of my said will in place of the said Frederick Newton Judson or J. Angus Shaw, so ceasing to act."

The fourth clause of the codicil provides as follows:

"I give and bequeath to the said Charles Evans Hughes the sum of one hundred thousand dollars (\$100,000), to the said Frederick Newton Judson the sum of fifty thousand dollars (\$50,000), to the said J. Angus Shaw the like sum of fifty thousand dollars (\$50,000) and to the said Robert Weeks De Forest the like sum of fifty thousand dollars (\$50,000), to be

received and accepted by them respectively in lieu of commissions as executors and trustees, and I direct that no compensation or commission as such shall be paid to them except that in the case of the trusts created under my said will this provision shall not apply to the commissions allowed by law for receiving and paying out the income of the respective trust funds and I direct that no bond or other security shall be required from them."

Judson having elected to claim his regular commissions by his filing the reunciation of the specific compensation bequeathed him as above, it is contended that he has disqualified himself to act as executor and trustee under the following provisions of article VIII of the third codicil, dated May 11, 1910:

"In case Frederick N. Judson or J. Angus Shaw or Robert Weeks De Forest shall fail to act as executor or trustee in the respective cases and *under the respective limitations prescribed in said codicil of January, 1910*, and in case said Harrington Putnam shall not act in place of Charles E. Hughes, then I appoint the said Harrington Putnam to be executor and trustee in the place of said Judson, Shaw or De Forest, as the case may be."

It is urged that the words "under the respective limitations prescribed in said codicil of January, 1910," have reference to the limitation on the compensation of Judson as executor and trustee; that this limitation is emphasized by the provision of the second and third codicils quoted above, providing for the substitution of Robert Weeks De Forest and Harrington Putnam as executors and trustees in case Judson "shall fail to act * * * under the respective limitations," etc.

The petitioner claims that the word "limitations," as used above, was intended by the testator to refer to the specific bequest of \$50,000 to Judson in lieu of commissions, and that Judson's acceptance of the compensation fixed by the testator is in the nature of a condition precedent to his appointment and

continuance in office as executor and trustee. In this connection it is necessary to examine the will and codicils to see if, as a matter of law, the testator did actually impose such a limitation on the compensation of Judson that his qualification as executor and trustee and his performance of duties as such necessarily implied his irrevocable acceptance of the amount bequeathed him as specific compensation.

In my opinion there is no such limitation upon Judson's right to act as executor and trustee. Under the provisions of the will and codicils Judson undoubtedly had the right to elect between the specific compensation bequeathed him and his regular commissions as executor and trustee. (Matter of Arkenburgh, 38 App. Div. 473.) If the testator intended to make Judson's appointment conditional upon his acceptance of the limited compensation, that intention was not expressed in the clear and precise language used everywhere else in the will and codicils. I believe the only reasonable interpretation of the word "limitations," as used in the codicil of May 11, 1910, regarding Judson, is that the testator referred only to the fact that Judson, unlike almost all of the others named as executors and trustees, was to serve only until testator's son Joseph reached the age of thirty, and was not given the power of removal like most of the others (codicil of January 17, 1910). As Judge BARTLETT said in Matter of Arkenburgh (*supra*): "Persons who make wills are supposed to know the law;" and it must be assumed that the testator knew that Judson could have acted as executor and trustee and collect the usual commissions, notwithstanding the provision for specific compensation. A perusal of the will and codicils, and a study of the clear, precise and unambiguous language employed throughout the will and codicils make it plain that if the testator's intention had been as asserted by the petitioner herein it would have been phrased in language whose meaning would be plain and unmistakable.

Decreed accordingly.

Matter of Proving the Last Will and Testament of AMELIA
GERTRUDE CUTTER, Deceased.

(Surrogate's Court, New York County, March, 1915.)

WILLS—WHEN PROBATE DENIED—TESTAMENTARY CAPACITY—BURDEN OF
PROOF.

Where the uncontradicted facts show that at the time of the making of her alleged last will testatrix was a diseased, drug-eating, dying old woman, and because of bodily and mental infirmities and her absolute seclusion in her own house was practically prevented from receiving independent and unselfish advice, and it appears also that her habitual use of morphine and codein in large quantities continued up to within a day or two of her death which was less than a month after the execution of the alleged will, which was the third one made by her during the last nine months of her life, and by which she disposed of an estate of over a million dollars in value, probate will be denied on the ground that proponents have not sustained the burden of proof of clearly and satisfactorily showing that at the time of executing the will testatrix had testamentary capacity and that the instrument expressed the free and untrammelled will of a capable testatrix.

PROCEEDINGS upon the contested probate of a will.

Miller, King, Lane & Trafford (Perry D. Trafford, of counsel), for George Ramsey and W. McMaster Mills.

Woodford, Bovee & Butcher (Gormley J. Sproull, of counsel), for Eureka Flagg.

DeGroot, Kenyon & Huber, for Elizabeth G. Buckley.

John McG. Goodale, special guardian for John Walls.

A. Perry Osborn, special guardian for unknown infants, etc.

Satterlee, Canfield & Stone, for Mary Patten.

Merle I. St. John, for John Lent, Elizabeth Buckley and George W. S. Lent.

The Attorney-General of State of New York, for unknown beneficiaries.

DeForest Brothers, for Presbyterian Hospital.

George S. Ingraham, for Methodist Episcopal Hospital.

O'Brien, Malevinski & Driscoll, for James H. Montgomery.

J. Mayhew Wainright, for American Society for the Prevention of Cruelty to Animals.

Cornelius J. Sullivan, for New York Society for the Prevention of Cruelty to Children.

Richard B. Kelly, for Methodist Episcopal Church Home.

Kendall & Herzog, for Hospital for Deformities and Joint Diseases.

COHALAN, S.— Henry T. Cutter, a large, if not the largest, stockholder in the drug house of Hegeman & Co., and his wife, Amelia G. or A. Gertrude Cutter, lived for about thirty-eight years in a large old-fashioned corner house at No. 781 Lexington Avenue, in this city. The house was sumptuously furnished with (as one witness described it) "the best that money could buy." In this home Mrs. Cutter gave many entertainments. Her own and her husband's relatives were received there by her. They seemed to be interested in her and she in them. The Cutters had no children. Up to about the last ten years of her life Mrs. Cutter lived as women in her circumstances usually do. She had servants and entertained her friends "in style," as one witness expressed it. She dressed well, even extravagantly. She

attended the opera and the theatre. She had horses, employed a coachman and went driving regularly. She gave to her toilet and appearance the care and to the amenities of social intercourse the attention that is naturally expected from a woman of refinement. When Cutter was about seventy-five years old, his wife then being about sixty-five years of age, a change came over their habits and method of living. Mrs Cutter abandoned largely her social interests and duties. She lost her interest in the niceties of dress. She gave up her attendance at the opera, disposed of her horses, discontinued her entertainments and discharged her servants. Eventually Cutter and she became practically recluses, almost unattended. In 1913 we find that they had reached a condition where they lived by themselves, using only two rooms and a pantry on the second floor of their house, at No. 781 Lexington Avenue, their only attendant being a furnaceman named "Beamish." His attention to the old couple was irregular, owing to an unfortunate addiction to drink. Mrs. Cutter, at times assisted by "Beamish," prepared the meals for the household on a two-burner gas stove in a pantry or passageway between the living room and the sleeping room on the second floor of the house.

After a serious illness Cutter died January 20, 1914, about two months prior to the execution of the paper herein propounded. At the time of his death he was eighty-three or eighty-four years of age. He was helpless, feeble and diseased.

The upstairs rooms of the house were always in great disorder. Except for the basement, the other parts of the house were kept locked. During this period the aforementioned "Beamish" looked after matters generally and attended to the furnace and marketing (when he was not too drunk to do so). There was no other servant. "Beamish" called in the morning and obtained admission to the house by the use of a key which Mrs. Cutter let down on a string from a front window on the second floor of the house. Empty, unclean milk bottles, milk bottles in

which the milk had soured, empty and partly filled cans, old vegetables, scraps of food which had not been eaten, used, unwashed dishes, soiled clothing, old rags and unclean vessels were scattered about the rooms or put away in the closet. Mrs. Cutter was averse to taking a bath or to having her body touched with water. She wore the same dress and petticoat and the same nightgown for the last two weeks of her life; in fact from January to March these articles of clothing seem to have been worn by her continuously, and were always soiled and unkempt. She wore her hair hanging, uncombed and unkempt. She ate raw oysters out of a pail with her fingers. When Cutter lay dying on the bed in January, 1914, Loretta McLaughlin, a seamstress, who remained in the house with Mrs. Cutter the last night of Cutter's illness and for a short time after his death, suggested to her that she moisten Cutter's lips. Mrs. Cutter declined to do so and told Miss McLaughlin she could do so if she wished to, but that she, Mrs. Cutter, was going to fix up the parlor for the funeral, which she then proceeded to do. The night before Cutter died Miss McLaughlin stated to her that her husband was dying and suggested that she sleep that night on a couch in the living room. Mrs. Cutter refused to do this, and said she was going to sleep with "Bubby;" whereupon she got into bed with the dying man and spent the night there. The next day Cutter died. Mrs. Cutter stated to Miss McLaughlin that she was afraid he would haunt her, owing to the fact that she had kicked him the night before he died because he had thrashed around in the bed and bothered her. During Cutter's illness, and in spite of the fact that he was worth upwards of \$1,500,000, Mrs. Cutter failed to call in a trained nurse or an attendant to wait on him. She had "Beamish" cut a hole through the mattress, upon which Cutter lay ill, and placed rags on the floor underneath the bed to receive the excrement from him. The day of Cutter's funeral Miss McLaughlin offered to assist Mrs. Cutter in dressing for the funeral. She refused to

take off, or permit to be taken off, the soiled nightgown she was wearing, and put on her outer clothing over this nightgown. After Cutter's death Miss McLaughlin remained with Mrs. Cutter for a few days. When Miss McLaughlin left, "Beamish," the man of all work, used to dress and undress Mrs. Cutter and used to take her to the bathroom. After the making of the will of March twenty-first, Mrs. Jaeger, the wife of a neighborhood grocer, came in and looked after Mrs. Cutter as best she could until the death of testatrix on April 3, 1914. "Beamish" and Mrs. Jaeger were the only nurses Mrs. Cutter had in her last illness. During this period there were filth and ordure on the floor, on the chairs and in the vessels which were left unclean in the upstairs rooms. Mrs. Cutter objected to having the windows open, and the rooms always had a foul odor, due to their unsanitary condition.

In one of these rooms she received visits from Ramsey, Mills, Tichenor, Bradner, Frauenthal and other actual and potential beneficiaries. In one of these rooms the paper propounded for probate was signed. Testatrix suffered from cancer of the uterus, chronic nephritis, toxemic poisoning, due to obstruction of the bowels, general anemia and arterio sclerosis. During this period she habitually took large quantities of morphine and codein. She used these drugs up to within a day or two of her death. There is no evidence that the doctors ever attempted to procure for her a trained nurse, nor did Ramsey, Mills or Tichenor ever attempt to bring in a trained nurse to take charge of this dying and suffering old woman. In spite of the filthy condition of her bed and clothing and though one of these doctors was a beneficiary, and must have been aware of her condition, she was not removed to a hospital, where she would be forcibly bathed, nor was any action taken in her behalf which common humanity would require. Was this because, as one of the witnesses said, Mrs. Cutter was "cranky" and would not submit to the ministrations of a trained nurse, or was it because

the beneficiaries in the propounded paper desired no outside interference with the scheme that had been concocted by them to divide among themselves an estate which may amount to upwards of \$1,500,000? Their sole ambition seems to have been to get the largest possible bequest from Mrs. Cutter; their sole endeavor to vie with each other in attempting to obtain the last will signed by this diseased, drug-eating, dying old woman. On March 21, 1914, to the house above described came Ramsey and the attorney for proponents to have the propounded paper signed by this woman. With them came the draftsman of the will, the witnesses — Olney, a clerk in said attorney's office; Lindermann, a clerk in the Union Trust Company, of which Mills was a vice-president; Gibney, another clerk in the same bank, and Eckstein, an employee of a drug company in which Ramsey had an interest. Olney came at the direction of his employer; Lindermann and Gibney by direction of Mills, and Eckstein by telephonic direction of Ramsey. They were admitted by "Beamish" and brought downstairs to the basement. Tichenor, a beneficiary in the propounded paper, was at that time closeted with Mrs. Cutter. Ramsey told "Beamish" not to tell Tichenor that he (Ramsey) was in the house. When Tichenor left the house Ramsey went upstairs. He returned in a few minutes and invited the draftsman and the proposed witnesses to the will to come with him to the living room of Mrs. Cutter. They found Mrs. Cutter propped up on a couch, wrapped in blankets. The attorney read the will to her. As the different clauses were read she nodded or said "yes." When the clause was read bequeathing the residuum of the estate to Ramsey and Mills, to divide among such charities as they saw fit, she remarked that she did not know about the charities or words to that effect. She was told that most of the legacies were the same as those in her husband's will. She said her husband's will was a "jumbled-up mess" and that she did not understand her husband's will anyway. The draftsman of the will and

attorney for proponents was evidently not aware of Ramsey's anxiety to get the last possible will from the testatrix, nor did he appreciate the rivalry between Frauenthal, Tichenor and Ramsey as to which of them would procure the last favorable will from the decedent. It appears that he made no particular inquiry or observation as to whether or not the paper signed by Mrs. Cutter on March twenty-first was in reality the free, unrestrained act of a competent woman who, at least, had an opportunity to receive independent advice. It can be fairly inferred from the testimony that he came to the house at the request of either Ramsey or Mills, not at the request of the testatrix.

Here in the living room on March 21, 1914, Mrs. Cutter signed the paper propounded for probate; it was also signed by the subscribing witnesses, and there is no doubt that what might be called the mechanics of executing a will were gone through with a proper regard for the forms of law.

The propounded paper is the third will made by Mrs. Cutter during the last nine months of her life. In August, 1913, Tichenor supervised the execution of a will in which Mrs. Cutter bequeathed to him a legacy of \$500,000. On March 11, 1914 (ten days prior to the execution of the will propounded for probate herein), Frauenthal's attorney, Mr. Kendall, prepared a will. In this will Tichenor's legacy was cut to \$50,000 and the residuary estate (which may amount to \$700,000) was left to an institution of which Frauenthal is the head. Tichenor was unaware of the execution of the will of March eleventh, or the one offered for probate herein. In these two wills Ramsey and Mills are given legacies of \$200,000 and \$100,000, respectively.

In the will now being contested, which is dated March 21, 1914, and with the drawing and execution of which neither Frauenthal nor his attorney nor Tichenor was connected, a material change is made in the disposition of the residuary

estate. In this last-mentioned will the residuary estate is bequeathed to Ramsey and Mills in trust to give to such charities as they prefer. Frauenthal's institution, the residuary legatee in the will of March eleventh, receives a legacy of \$25,000 instead of the residuary estate.

It is fairly evident, therefore, that during the last months of her life testatrix was apt to favor in her will whoever procured and supervised the execution thereof. There is testimony showing that Ramsey was dissatisfied with the will of March 11, 1914, in which Frauenthal's institution was the chief beneficiary. Ramsey said the will of March eleventh was illegal and would not stand a test in a court of law. He called on Kendall, the attorney who drew this will, and asked him to have Mrs. Cutter execute a codicil making a bequest to a charity in which Mrs. Ramsey was interested. It appears that Ramsey had charge of the execution of the propounded paper. Ramsey procured the four witnesses; Ramsey made arrangements for the witnesses to attend the house; Ramsey had charge of the party at the house; Ramsey gave instructions to "Beamish," and Ramsey brought the witnesses to Mrs. Cutter's room.

The testimony leaves no doubt that Mrs. Cutters's mind had become greatly weakened during the last few months of her life. There can likewise be no doubt that during this period her mind was constantly drugged by the morphine and codein she was in the habit of taking. During this period Ramsey, Mills and Tichenor were frequent visitors at the house. Tichenor bought chops for her at a neighborhood butcher store. He sometimes attended to the furnace. Ramsey, not to be outdone, brought chickens to her.

The two persons who appear to have been most kind to her, "Beamish" and Mrs. Jaeger, are not remembered in the will although she had promised Mrs. Jaeger two houses and stated that she would remember "Beamish" in her will.

Various experts gave testimony for the proponents and for the

contestants concerning the testamentary capacity of the deceased. I shall only refer to the testimony of the proponents' experts. Dr. Jeliffe, for the proponents, testified that the effect of taking drugs, such as acetanilid, codein and morphine, would tend to make Mrs. Cutter inattentive and cause her to show less interest in what went on about her. He said that this inattention and lack of interest might also extend to other things besides immediate surroundings. Dr. Gregory, the proponents' other alienist, was of the opinion that the testatrix had testamentary capacity to make the will offered for probate because it was not an entirely new will; "that she had made wills before and that this will in a way was in harmony with her previous wills." He said: "Q. Then if this had been a new proposition, a new question and a new will, could she have had intelligence enough to attend to it? A. It would have been difficult for her, a sick person, to transact an entirely new business in that condition." And further: "If we assume that she made a will that day that was entirely different and that she mentioned many individuals who were new to her that had no connection with the previous will, I should say that it would be very difficult for her to do that because of her physical sickness."

The will offered for probate is not a simple will. It contains the names of many legatees with legacies of various amounts. There are several provisions that require considerable intelligence to grasp. The testimony of proponents' own alienist, Dr. Gregory, is to the effect that the testatrix was unable to comprehend the contents of the will as a new proposition. Proponents' witnesses testified that the deceased said at the time of the execution of the will that her husband's will, which the later wills followed in part, was a "jumbled-up mess." This would indicate that at the time of executing the paper propounded the testatrix was unable to understand the wills upon which the last will was based. There is a material change between the will of March 11, 1914, and the will of March 21,

1914. Dr. Frauenthal's hospital is cut down from a possible \$700,000 to a legacy of \$25,000, and the difference is handed over to Ramsey and Mills to distribute to whatever charities they prefer. There is nothing to explain this change of testamentary intention except a possible motive of cupidity on the part of Ramsey.

The above facts show this to be a case having all the ordinary indications of fraud. The uncontradicted facts show that the deceased had become greatly weakened in mind and body. She was of advanced age and, because of her bodily and mental infirmities and her absolute seclusion, was practically prevented from receiving independent and unselfish advice. Her easy accessibility to the approach of designing men, together with the other remarkable features and circumstances of the case, cast upon the proponents a heavy burden to show clearly and satisfactorily that at the time of executing the paper propounded herein the testatrix had testamentary capacity and that such paper expresses the free and untrammelled will of a capable testatrix. Without any further discussion of the principles of law involved I will say that I am not satisfied that the proponents have discharged that burden and I will, therefore, deny probate to the paper propounded as the last will and testament of the deceased.

Probate denied.

Matter of the Estate of GERTRUDE VOSSELER, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

WILLS—WHEN DECLARATIONS OF TESTATRIX INADMISSIBLE AS EVIDENCE OF
TESTAMENTARY INTENTION—PRESUMPTION THAT TESTAMENTARY GIFT IS
ABSOLUTE UNLESS QUALIFIED BY WORDS OF GIFT—WORDS OF LIMITATION
—HEIRS AND ASSIGNS.

Unless a will is ambiguous or equivocal the declarations of the testatrix to the draftsman of the will are inadmissible as evidence of testamentary intention.

Where a residuary estate was given to four persons, one of whom was Mrs. H, a sister-in-law of testatrix, "their heirs and assigns, to have and to hold the same to their own use, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*," the gift to Mrs. H will be regarded as absolute and not as substitutional, and lapsed upon her dying before testatrix.

The presumption is that a testamentary gift is absolute unless clearly qualified by the words of gift.

Before the Revised Statutes the doctrine of lapse applied indiscriminately to gifts with and without words of limitation to heirs or to heirs of the body, and it also applied equally to gifts of personalty even where words of limitation to executors or administrators had followed a bequest to a person deceased before the will took effect.

The Revised Statutes (2 Rev. Stat. 66) saved devises and bequests to a particular child or other specified descendant of testator and did not refer to devises and bequests to any other person, and the disposition of testatrix's residuary estate did not come within those classes of devises and bequests to which the doctrine of lapse does not apply.

The devise under the residuary clause was not to a class but rather to the devisees named and cannot be construed as intending to vest a life estate in the named beneficiaries and a remainder to their heirs.

PROCEEDING construing will of testatrix upon the accounting of the administratrix with the will annexed.

Graham & Stevenson, for Caroline M. Tamargo, administratrix.

William Duncan Cameron, special guardian for Charles Manke and Joseph Manke.

J. Robert Rubin, special guardian for William Bourdet.

Root, Clark, Buckner & Howland (Grenville Clarke and Silas W. Howland, of counsel), for Annie Miller and Edward Bourdet, adult heirs of Mrs. Helbig.

Morris Grossman (Benjamin H. Messler, of counsel), for respondents Joseph Manke et al.

FOWLER, S.—The construction of the will of testatrix becomes necessary upon the accounting of the administratrix *cum testamento annexo*. The third paragraph of the will reads as follows:

“*Third.* I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of whatever name or kind, and wheresoever the same may be or is situated, which I now own, am seized or possessed or otherwise interested in, or which I may at any time hereafter acquire and be interested in, unto the following named persons, viz: My brother-in-law, Jacob Vosseler; my niece, Lena Damarco, nee Meixmer; my sister-in-law, Mrs. Helbusch, nee Vosseler, and my sister-in-law, Mary Vosseler, the two last named being residents now or late of the City of New Orleans, La., their heirs and assigns, to have and to hold the same for their own use, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*.”

Mrs. Helbig, a sister of the testatrix's husband, misnamed “Helbusch” in the will, predeceased the execution of the will, but whether this was known to the testatrix is uncertain, and for the purpose of this case immaterial. Mrs. Helbig left as her sole heirs two daughters, both of whom were living at the date of testatrix's death. The question in this proceeding is whether these heirs took by substitution the share sought to be devised and bequeathed to Mrs. Helbig under the will, or

whether the devise and bequest to Mrs. Helbig was absolute and, therefore, lapsed.

The heirs of Mrs. Helbig ask leave, if necessary, to introduce certain declarations of testatrix made to the draftsman of her will as evidence of her testamentary intention. Such declarations are generally inadmissible for the purpose of construing a will (*Reynolds v. Robinson*, 82 N. Y. 106; *Mann v. Mann*, 14 Johns. 1), unless it is ambiguous or equivocal (*Ritch v. Hawxhurst*, 114 N. Y. 512); but the nature of the extrinsic evidence is then restricted by rules not now uncertain in their limitations. The main question on this will is whether the daughters of Mrs. Helbig were intended to take by substitution the share of their predeceased mother in the residuary estate of testatrix, or whether the gift to their mother was absolute and lapsed by reason of the death of Mrs. Helbig before testatrix. This question is one of construction on the face of the will, and no extrinsic evidence of intention seems proper or competent under the authorities.

First, is the gift to Mrs. Helbig, her heirs and assigns, absolute or substitutional? The language of the will now before me is peculiar. By the third clause testatrix gives the residuary of her estate to four persons (one of whom is Mrs. Helbig), "their heirs and assigns, to have and to hold the same to their own use, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*." The words "heirs and assigns," standing alone, would undoubtedly be regarded as words of limitation, and not as importing a substitution. (*Bolles v. Bacon*, 3 Dem. 43; *Matter of Wells*, 113 N. Y. 396.) It is admitted that if the gift had been to Mrs. Helbig, her heirs and assigns, it would undoubtedly, under the authorities, have been absolute and defeated by her death prior to testatrix. But it is insisted that the words "heirs and assigns" do not stand alone in the limitation, as the will goes on to provide that the four persons specifically named (including Mrs. Helbig), "their

heirs and assigns," are "to have and to hold the same for their own sake, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*." Counsel argues that to hold that the words "*per stirpes* and not *per capita*" are to be disregarded or given no effect at all would ignore that cardinal rule of construction which requires all the expressions in a will to be given effect or consideration whenever it is possible.

What the legal effect of the words "*per stirpes* and not *per capita*" in such a limitation as that employed in Mrs. Helbig's will does not seem to be determined expressly in this State. But it is argued by counsel for Mrs. Helbig's heirs that several cases in the later English books afford analogies which should not be disregarded by the surrogate. (*Dick v. Lacy*, 8 Beav. 214; *Pearson v. Stephen*, 5 Bligh [N. S.], 203.) I have examined those decisions with care and am not convinced that their reasoning applies here. Those adjudications were constructions of remainder interests, which is not the fact here.

Here the qualification of the gift, if any, is continued in what may be called the *habendum* clause and not in the gift itself. It seems to me that this being so, under the law of this State, the gift to Mrs. Helbig is to be regarded as an absolute gift to her only and not a substitutional gift to some one else in the event of her death. The presumption of our law is that a testamentary gift is absolute, unless it is clearly qualified by the words of gift. The qualification in this will is not contained in the words of gift, but in what may be called the "*habendum*" clause beginning "to have and to hold the same." Now, the words of an "*habendum*" clause necessarily relate only to the quantity of the estate or interest the donee, Mrs. Helbig, herself was intended to take. It seems to me that the true construction of this will is that the bequest or devise to Mrs. Helbig was absolute and unqualified, and that the words following "to have and to hold" in the third clause of the will do not cut the gift

down or make it conditional. If absolute, it is conceded that the gift lapsed by reason of Mrs. Helbig's death before testatrix. It is, perhaps, unnecessary to refer to the doctrines governing lapsed devises or legacies, except very briefly.

Before the Revised Statutes the doctrine of lapse applied indiscriminately to gifts with and without words of limitation to heirs or to heirs of the body, and it also applied equally to bequests of personalty, even where words of limitation to his executors or administrators had followed the bequest to a person deceased before the will took effect. (*Matter of Wells*, 113 N. Y. 403; *Kimball v. Chappel*, 27 Abb. N. C. 437.) When mere words of limitation and not of substitution were added to a devise or bequest to a person who died before testator, they did not prevent a lapse. (*Britt v. Rigden*, Plowd. 340, 345; cited 113 N. Y. 403.)

The Revised Statutes saved devises and bequests to a particular child or other specified descendant of the testator and do not refer to devises and bequests to any other persons. (2 R. S. 66.) The result is that the common-law doctrines concerning the lapse of legacies and devises still prevail in respect to every devise and bequest which is not made specifically to a child or other descendant of the testator. The disposition of the property of testatrix under the third paragraph of her will does not come within those classes of devises and bequests to which the doctrine of lapse does not apply. It is not necessary to refer to these exceptions at length, except to note that these exceptions are fundamental and remain exceptions at present.

It is conceded by all the parties in court that the will of Mrs. Vosseler cannot be construed as intending to vest a life estate in the named beneficiaries and a remainder in their heirs. The devise is not to a class, but rather in fee to the devisees named. As stated before, the words "heirs and assigns" are mere words of limitation and do not import a substitution (*Bolles v. Bacon*, 3 Dem. 43; *Matter of Wells*, 113 N. Y. 396), and the doctrine

of lapse applies unless the testamentary gift was substitutional, which I hold it was not. The devise to Mrs. Helbig having lapsed, testatrix must be deemed to have died intestate as to that part of her estate which she sought to dispose of for the benefit of Mrs. Helbig. Settle decree accordingly.

Decreed accordingly.

Matter of the Estate of FULLER CHENERY, an Infant.

(Surrogate's Court, New York County, March, 1915.)

**GUARDIANS—WHEN COMMISSIONS GRANTED IN ACCORDANCE WITH STATUTE
—WHEN GUARDIAN NOT ENTITLED TO COMMISSIONS ON INCOME RECEIVED
EACH YEAR—CODE CIV. PRO., § 2753.**

The commissions of a guardian must be granted in accordance with the statute in force at the time he accounts.

Under section 2753 of the Code of Civil Procedure, which provides that a guardian who pays over income as required and renders an annual account shall be allowed the same commissions thereon as he would be allowed on principal on a judicial settlement, and that if he does not render such annual account he shall be allowed on the judicial settlement of his accounts commissions on the total income then payable to the beneficiary, the general guardian of an infant, who was directed to accumulate the income of a trust fund for the benefit of the ward and none of the income was ever paid to him, is not entitled to commissions on income received each year, but only on the gross income received and ready for payment to the beneficiary at the final accounting.

PROCEEDING upon the accounting of a general guardian of an infant.

Sullivan & Cromwell, for petitioner.

FOWLER, S.—The Equitable Trust Company, as general guardian of Fuller Chenery, an infant, has filed its account and

asks that the surrogate allow it commissions upon the annual income from the trust fund as if such income were paid out each year for the use of the infant. The guardian was directed to accumulate the income for the benefit of its ward. None of the income has been paid to the infant. The disbursements of income made by the guardian were for personal taxes and counsel fees paid to counsel for the guardian. Commissions must be granted in accordance with the law in force at the time of the accounting. (Naylor v. Gale, 73 Hun, 53; Whitehead v. Draper, 132 App. Div. 802.) Section 2753 of the Code of Civil Procedure provides that "if * * * a guardian is required to receive income and pay over the same, and such * * * guardian pays over said income and renders an annual account to the beneficiary of all his receipts and disbursements on account thereof, he shall be allowed, and may retain, the same commission on the amount so accounted for as he would be allowed upon principal on a judicial settlement." In order to entitle a guardian to commissions on the annual income of the trust fund, it must appear not only that the guardian has filed an annual account, but that the income has been paid over for the use of the ward. The second clause of the paragraph of section 2753 from which the above quotation is taken provides that "if he does not render such annual account, he shall be allowed, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary." In the first clause it is provided that he must not only render an annual account, but also pay over the income; in the second, if he does not render *such an account* he will be entitled only to commissions upon the entire amount then payable to the beneficiary. I am inclined to think that the words "such an account" refer to the annual account and paying over of annual income provided for in the first clause, and that unless such annual account is rendered and annual income paid over to or for the use of the beneficiary the guardian is not

entitled to commissions upon the income received each year, but that commissions should be allowed upon the gross income received and ready for payment to the beneficiary at the time he renders his account. The Equitable Trust Company, therefore, will only be allowed commissions upon the entire amount of income received by it from the trust fund for the benefit of the infant. Costs taxed.

Decreed accordingly.

Matter of the Estate of THOMAS H. FAILE, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

EXECUTORS AND ADMINISTRATORS—WHEN LETTERS OF ADMINISTRATION SHOULD ISSUE TO ONE OF RESIDUARY LEGATEES—WHEN DECREE BECOMES INEFFECTIVE.

Where upon the consent of all parties in interest a decree was entered that letters of administration should issue to one of the residuary legatees, and to two persons not interested in the estate, the decree becomes ineffective where said residuary legatee dies before the letters are in fact issued.

APPLICATION for letters of administration with the will annexed.

Brush & Crawford, for petitioner.

FOWLER, S.— This is an application for letters of administration with the will annexed. On the 9th of February, 1915, an order was made directing that letters of administration with the will annexed issue to Henry K. Pomeroy, H. Arthur Pomeroy and Mary E. Pomeroy upon their executing a bond with sufficient sureties in the sum of \$45,000. Mary E. Pomeroy was a residuary legatee under the will of the testator. Henry K. Pomeroy and H. Arthur Pomeroy were not legatees and had no interest in the estate. Subsequently to the entry of

the decree and before letters were issued to the persons therein mentioned, Mary E. Pomeroy died. Henry K. Pomeroy and H. Arthur Pomeroy now ask that letters of administration with the will annexed issue to them upon their complying with the provisions of the decree of February 9, 1915. Section 2603 contains an enumeration of the persons entitled to letters of administration with the will annexed. It is there provided that letters shall issue to one or more residuary legatees, and section 2588 is made applicable to a proceeding brought under section 2603. Section 2588 provides that letters of administration may be granted to one or more competent persons jointly with, and upon the application of, a person entitled to such letters, "or to a competent person or persons not entitled, upon the consent of all the persons entitled to take or share in the estate." The moving papers contain the consent of all the persons entitled to share in the residuary estate that Mary E. Pomeroy, a person entitled to share in the estate, Henry K. Pomeroy and H. Arthur Pomeroy, receive letters of administration with the will annexed; but there is no consent of such persons that letters of administration with the will annexed shall issue to Henry K. Pomeroy and H. Arthur Pomeroy independently of their connection with Mary E. Pomeroy. The decree heretofore entered was based upon the petition of a legatee who was entitled to letters of administration. Before letters were issued this legatee died; therefore the decree became ineffective, because the necessary allegations upon which it was granted were fundamentally changed by the death of the petitioner. Those persons who were not entitled to share in the estate, but to whom the decree directed that letters issue in conjunction with the petitioner, are not now entitled to such letters. In order to entitle them to letters it will be necessary for them to file a petition containing the consent of all the persons entitled to take or share in the estate who are within this State and competent.

Decreed accordingly.

Matter of the Estate of SAMUEL H. SPINGARN, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

WILLS—DECLARATIONS CONTAINED IN—BEQUEST OF CERTAIN AMOUNT AND ALL MONEYS COLLECTED FROM LIFE INSURANCE IN LIEU OF DOWER.

Where a will declares that a bequest to testator's wife of \$30,000, and all moneys collected at his death from life insurance, whether in his name or hers, which together aggregate in amount \$50,000 which he intends she shall receive and which sum he declares is deemed by him to be sufficient to maintain her comfortably during the rest of her life, and said sum is given in lieu of her dower right in his real estate, she is entitled to \$50,000 in the aggregate and not the \$30,000 plus \$21,021.23, the proceeds of the life insurance.

PROCEEDING under section 2615 of the Code of Civil Procedure to obtain a construction of a will.

Arthur B. Spingarn, for executor, petitioner.

Emanuel S. Cahn, for Bertha Spingarn, executrix, respondent.

FOWLER, S.— This proceeding was instituted under section 2615, Code Civil Procedure, to obtain a construction of clause twenty-eight of the last will and testament of Samuel H. Spingarn. Clause twenty-eight of said will reads as follows:

"Twenty-eight. I give and bequeath to my beloved wife, Bertha Spingarn, the sum of thirty thousand (\$30,000) dollars and such sums payable to my estate upon my death from policies of life insurance, which sums, together with all policies of life insurance payable to her at my death, shall in the aggregate amount to fifty thousand (\$50,000) dollars, it being my intention that she shall receive fifty thousand (\$50,000) dollars in all after my decease, which amount is to include all moneys collected at my death from life insurance policies whether in my name or hers. This sum, together with the amount of property

which my beloved wife already has, is deemed by me to be sufficient to maintain her comfortably during the rest of her life, and is given in lieu of dower or right of dower which she may have or claim to have in and to my estate."

The testator executed his will on December 11, 1908, and died on November 27, 1913, almost five years later, leaving an estate valued between \$400,000 and \$500,000. It is expressly averred in the petition that there is a considerable surplus after paying all the debts, funeral expenses, expenses of administration and the specific legacies, and there is a sufficient sum in the residuary estate to pay the amount claimed by Bertha Spingarn under the twenty-eighth clause of testator's will.

The thirty-seventh clause of testator's will authorizes and empowers but does not direct the executrix and trustee to defer and postpone the payment of all legacies and bequests under the will until three years after his decease, except the legacy bequeathed to his wife, Bertha Spingarn, which "shall be paid her as soon after my decease as may be convenient and within the statutory period. * * *"

Mrs. Spingarn, therefore, is at present in a position, as sufficiently appears from the petition, to make an application for the payment of her legacy. A construction of the will is, however, necessary before the application could be granted. But for these reasons, and the fact that the construction affects personal property only, I should have preferred to defer the construction until an accounting.

It is admitted by the parties that testator was seventy-eight years of age when he executed his will, and that at the time of his death there were three policies of life insurance on the life of testator. These policies, together with accrued premiums, amounted to \$21,021.23. One policy was a policy of \$3,000, payable to Bertha Spingarn, and the other two policies were policies of \$10,000 and \$5,000, respectively, payable to testator's estate.

The main question on this will is whether the widow is entitled to receive as her legacy under the twenty-eighth clause of the will the sum of \$50,000 or whether she should receive the sum of \$51,021.23, the aggregate of the life insurance, and the \$30,000 given outright to the widow.

The will of testator expressly limits the amount to be received by his widow from all sources to \$50,000, and he immediately follows this expression of his testamentary intention with the words: "This sum, together with the amount of property which my beloved wife already has, is deemed by me to be sufficient to maintain her comfortably during the rest of her life."

It is, however, contended on behalf of Mrs. Spingarn that the testator bequeathed to his widow under clause twenty-eight of his will the sum of \$30,000, and all sums payable upon his death from policies of life insurance, and that the language of the twenty-eighth clause is so ambiguous and doubtful that the intention of testator to cut down the absolute gift or to limit it to \$50,000 is not clear. This is the whole question. It seems to me that the intention is clear and is to govern and that by the twenty-eighth clause of the will the widow is entitled to receive \$50,000 in the aggregate, and not \$51,021.23.

Decreed accordingly.

Matter of the Estate of LEMUEL LITTLEFIELD, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

WILLS—DEVISE OF MORTGAGED REAL ESTATE IN TRUST—DUTY OF EXECUTOR TO PAY INTEREST ON MORTGAGES WHICH ACCRUED AFTER DEATH OF TESTATOR—POWER OF SALE OF REAL PROPERTY.

Testator devised his mortgaged real estate in trust to hold, manage, direct and control it and to collect the rents, issues and profits thereof and after payment of taxes, insurance and all other proper charges

and expenses to apply the remainder of the income to the use of certain persons, etc. *Held*, that the executor to whom was given a power of sale of real property and who was directed by the will to pay off, satisfy and fully discharge any and all mortgages, taxes, assessments, accrued interest on said mortgages or any other charges existing at the time of his death against said real estate, was in duty bound to pay the interest on mortgages which accrued after the death of testator.

PROCEEDING for the construction of a will under section 2615 of the Code of Civil Procedure.

Frost & Nieman, for petitioner.

Murray, Prentice & Howland (Robert H. Straham, of counsel), for Equitable Trust Company.

Strasbourger, Eschwege & Schallek (Max L. Schallek, of counsel), for Frances Littlefield.

FOWLER, S.—This is a proceeding for the construction of testator's will under section 2615, Code Civil Procedure. By paragraphs 2 and 3 of his will the testator devised to the Equitable Trust Company, as trustee, certain properties at No. 320 West Fourteenth Street in trust for Cornelia Carthwaite during her lifetime or until her remarriage, and at No. 318 West Fourteenth Street in trust for Frances Littlefield during her lifetime or until her remarriage with remainders over.

Paragraph 2 of said will is as follows:

"Second. I do hereby give and devise all that certain house and lot of land in the borough of Manhattan, city, county and state of New York, now known as number three hundred and twenty (320) West Fourteenth street, unto the Equitable Trust Company of New York, in trust, nevertheless, and upon the following uses and trust: In trust to hold, manage, direct and control the said real property, and in trust to collect and receive the rents, issues and profits thereof, and after the due

payment of any and all taxes, assessments, insurance charges and all other proper charges and expenses, including the expenses of maintaining the said real property in good repair and condition, to apply all the remainder of such income from the said real property unto the use of Cornelia Garthwaite, of the said city of New York, in quarterly payments, during her lifetime or until her remarriage, and at her death or remarriage I do hereby give and devise all the said real property absolutely unto my dear brother, Irving E. Littlefield, unto my dear sister, Bertha A. Hayner, and unto my dear niece, Cora Derrick, to be divided among them equally, share and share alike; if any of them at that time be dead, leaving issue them surviving, then it is my will and I do hereby direct that such issue shall have and take absolutely the share or portion which the parent of such issue would have been entitled to if living." Paragraph 3 of said will is similar in its terms and provisions except a different beneficiary and a different property are named.

The property at No. 318 West Fourteenth Street is subject to a mortgage of \$10,000, and the property at No. 320 West Fourteenth Street is subject to a mortgage of \$12,000. These mortgages mature on November 1, 1915. The mortgage interest is payable semi-annually on April first and October first.

The testator died on March 20, 1914. One semi-annual interest payment of \$495, which accrued after the death of the testator, became due on October 1, 1914. This has not been paid. The question before the surrogate is whether it is the duty of the executor of the said will or the trustee named therein to pay the mortgage interest on the two mortgages which accrued after the death of the testator.

Paragraph 4 expressly directs, authorizes and empowers "my said executor, hereinafter named, to convert into cash all the rest, residue and remainder of my property and estate, real or personal, not herein specifically disposed of, and all such real property as may come into his possession as such executor, and for such purposes do hereby authorize and empower my said

executor to sell at public or private sale, together or in parcels, any and all of real estate or personal property at such time or times and in such manner and for such sum or sums as to him in the exercise of his best judgment and discretion may seem best. * * *

Paragraph 5 of the will reads as follows:

"Fifth. I do direct my said executor, as speedily as may be practicable, to pay off, satisfy and fully discharge any and all mortgages, taxes, assessments, accrued interest on such mortgages or any other charges that may be existing at the time of my death as against or upon each and both of the aforesaid houses and lots of land in said West Fourteenth street, in the aforesaid Borough of Manhattan, heretofore specifically disposed of in clauses second and third of this my last will and testament."

In my opinion the second and third clauses of the will do not impose on the trustee the duty of discharging the interest accruing after testator's death on the mortgages in question. The fifth clause of the will does, in my opinion, impose such duty on the executor.

Decreed accordingly.

Matter of the Estate of SARAH AKIN, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

JUDGMENTS—FOREIGN—INQUIRY AS TO JURISDICTION—DIVORCE—FOREIGN—
EFFECT AS TO RIGHT TO INCOME OF TRUST FUND.

The courts of this State are not prevented by the "full faith and credit" clause of the Federal Constitution from inquiring into the jurisdiction of a court of a sister State to render a judgment upon which either of the parties to an action relies as the basis of right to invoke the aid of our courts.

A husband, after abandoning his wife in this State where they were married, became a resident of the State of Nevada and therein obtained a decree of divorce against his wife in an action in which she did not appear, the process having been personally served upon her in the State of New Jersey. The courts of this State will not recognize such divorce.

Such a divorce will not operate to prevent trustees of a fund from paying in their discretion the income to the husband or his wife, or partly to each, and the husband's application for an order directing the trustees to pay to him the entire income will be denied.

APPLICATION under section 2689, Code of Civil Procedure, directing trustees to pay income to petitioner.

Edward G. Delaney (Samuel Dickstein, of counsel), for petitioner.

Paul E. Whitten, for trustees.

Avery, Schlesinger, Harris & Davidson, for Julia Miller.

FOWLER, S.—The petitioner, Oscar Clark Miller, alleges that he is a legatee named in the second paragraph of the codicil to the last will and testament of Sarah Akin, deceased; that he is entitled to the entire income of the trust fund mentioned in the said codicil; and he makes this application under section 2689, Code of Civil Procedure, to obtain an order directing the trustees to pay the said income to him. The paragraph referred to reads as follows:

"I give and bequeath to my trustees the sum of twenty-five thousand dollars (\$25,000), to have and to hold the same for the following uses and purposes: To invest the same in such securities as are directed in my said will in respect to such sums as are given in said will to my trustees in trust; to collect the rents, income and profits thereof, and in their discretion and from time to time to pay the whole of the net income arising therefrom either to my nephew, Oscar Clark Miller, or to his

wife, Julia Miller, or a portion of such net income to one, and the remaining portion to the other, during the term of the life of the said Oscar Clark Miller, and upon and after his death to divide and pay over the said principal sum in equal shares to and among his surviving children and the issue of such of them who may then be dead, such issue taking the share which their parent would have taken if he or she had survived the said Oscar Miller."

The petitioner alleges that on the 23d of December, 1913, he obtained a decree of absolute divorce from his wife, Julia A. Miller, and he contends that after the date of such decree she was not entitled to any part of the income from the trust fund, that he then became absolutely entitled to the said income, and that the trustees were divested of the discretionary power of payment given to them by the testatrix. Attached to the petition is an exemplified copy of the decree of divorce granted by the Second Judicial District Court of the State of Nevada, in and for the county of Washoe, in the case of Oscar Clark Miller against Julia A. Miller.

The petitioner alleges that he resides in the borough of Brooklyn, city of New York, and that Julia A. Miller resides at Atlantic City, in the State of New Jersey.

The petitioner's claim to the entire income is based upon the effect of the decree of divorce granted to him by the District Court of Nevada. If that decree is invalid, or if the courts of this State refuse to recognize it, there can be no question of the right of the trustees to pay the income of the trust fund to either Oscar Clark Miller or Julia A. Miller, or to pay such portion of the income to either, as they in their discretion may deem advisable.

The courts of this State are not prevented by section 1 of article IV of the Federal Constitution from inquiring into the jurisdiction of a court of a sister State to render a judgment upon which either of the parties relies as the basis of his right

to invoke the aid or ~~intercession~~ of our courts. (Winston v. Winston, 165 N. Y. 553; Olmsted v. Olmsted, 190 id. 458.) The petitioner resides in this State and has subjected himself to the jurisdiction of this court; the trustees against whom the proceeding is brought are within the jurisdiction of this court, and the will under which the petitioner claims to be entitled to the legacy was probated by this court. In order to determine the right of the petitioner to the entire income of the trust fund mentioned in the codicil it is necessary for this court to determine whether the decree of the District Court of Nevada is binding upon this court, and for this purpose to inquire whether that court acquired such jurisdiction over Julia A. Miller as would, under the decisions of the courts of this State, justify this court in regarding the said decree as valid and binding for the purpose of this proceeding. The papers before the court upon this application show that Oscar Clark Miller and Julia A. Miller were married in the State of New York, that they continued to reside here for some time after their marriage, that subsequently Oscar Clark Miller abandoned his wife and became a resident of Nevada, that Julia A. Miller never became a resident of that State and was never personally served with process within that State in the divorce action brought against her by her husband, and that she did not appear in that action. Personal service of process was made upon her in the State of New Jersey. From these facts it is clear that the District Court of Nevada never obtained jurisdiction of Julia A. Miller, and that the decree of divorce granted by that court to Oscar Clark Miller on the 23d day of December, 1913, will not be recognized by the courts of this State. (Jones v. Jones, 108 N. Y. 415; Winston v. Winston, 165 id. 553; Tysen v. Tysen, 140 App. Div. 370; Haddock v. Haddock, 201 U. S. 562.) As the courts of this State will not recognize the validity of the decree of divorce granted to Oscar Clark Miller by the District Court of Nevada, it follows that in so far as the present

proceeding is concerned Julia A. Miller is still the wife of Oscar Clark Miller, and the trustees may in their discretion pay the whole or any part of the income of the trust fund to her.

The petitioner, therefore, is not entitled to an order directing the trustees to pay to him any part of the income from the trust fund.

Application denied.

Matter of the Estate of CONRAD R. GROSS, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

WILLS—PROVISIONS OF CODICIL—DIRECTION TO TRUSTEES AS TO TRUST FUND—AUTHORITY TO EXECUTOR TO PAY SUCH PART OF PRINCIPAL AS DEEMED PRUDENT—WHEN RIGHT TO PRINCIPAL OF TRUST FUND ABSOLUTE.

A provision in a codicil which purports to limit or defeat a bequest given by a will will not be given this effect unless the language of the codicil is as clear and explicit as that of the will to which it relates.

Testator by his will directed his trustees to set apart the sum of \$20,000 for each of his daughters and pay the income thereof to each of them, and directed that \$3,000 of the principal be paid to each upon her marriage and that the unimpaired principal in the case of an unmarried daughter, or the remaining principal in case of a married daughter, be paid to each when the youngest child surviving testator reaches majority. By a codicil the executors were authorized and empowered in their discretion to pay to said daughters such part of the principal as they might deem prudent. *Held*, that upon the youngest daughter reaching her majority her right to the principal of the trust fund, and also that of her sisters, was absolute, and not subject to the discretion and approval of the trustee.

APPLICATION for the construction of a will under section 2615 of the Code of Civil Procedure.

Herbert H. Flagg, for petitioner.

Walter Lindner, for George Herbener and August Gross, executors.

Peter J. McCoy, Jr., for respondent Lena Gross.

FOWLER, S.— This is an application for a construction of testator's will under section 2615, Code of Civil Procedure. The petitioner is a legatee named in the will. Prior to the commencement of this proceeding she made an application for the payment of her legacy, but this court denied the application upon the ground that it would be necessary to construe the will before the question of her right to the legacy could be determined.

In subdivision b of paragraph fifth of the decedent's will he directed his trustee to set apart the sum of \$20,000 for each of his daughters and to "invest the same and collect the interest and income thereof, and to pay such interest and income to my said daughters respectively. In case any of my daughters marry after my death, my said executors and trustees are directed to pay to such daughter upon her marriage the sum of \$3,000 out of the sum of \$20,000, held in trust for such daughter. My said executors and trustees are directed to pay said sum of \$20,000, or the sum of \$17,000 remaining in case either of my daughters shall have married after my death, to my said daughters respectively, when my youngest child surviving me comes of the age of 21 years." A codicil to the will contains the following provision: "And I do hereby further authorize and empower my said executors in case they in their discretion shall deem it prudent and wise to pay over to my said daughters or to either of them so much of the principal sum so set apart for my said daughters as they may deem proper."

The petitioner is the testator's youngest child, and she became twenty-one years of age on the 9th of June, 1910. She is not

married. She contends that she is now entitled to the sum of \$20,000, set apart for her in subdivision b of paragraph fifth of her father's will. The trustees contend that under the provisions of the codicil above quoted they are vested with discretion as to the amount which they may pay the petitioner, and the time when such payment may be made. I am inclined to think that it was the intention of the testator in subdivision b of paragraph fifth that his executors should pay to each of his daughters who got married after his death the sum of \$3,000 upon her marriage, and the balance of \$17,000 when the youngest child arrived at the age of twenty-one years, and that they should pay to each of his daughters who did not get married before the youngest child arrived at the age of twenty-one the sum of \$20,000 when such youngest child had arrived at the age of twenty-one, and that by the codicil he intended to empower his executors to pay any of his daughters prior to the date of distribution of the principal sum of \$20,000, such part of said principal sum as they in their discretion deemed prudent. It is probable that the testator felt that the income from \$20,000 might not be sufficient for the support and maintenance of any of his daughters who might remain unmarried until the youngest arrived at the age of twenty-one, and that it was to supply this deficiency that he empowered his executors in the codicil to pay to either of his daughters such sums from the principal as they considered advisable. There is nothing in the codicil which would indicate that it was the intention of the testator to limit the legacy given in subdivision b of the will. Reading the will and codicil together, and according to each of them the meaning above indicated, their provisions are not repugnant; both may be given effect. But giving to the codicil the meaning contended for by the executors would limit the clear and precise provision contained in the will for the benefit of decedent's daughters. A provision in a codicil which purports to limit or defeat a bequest contained in the will will not be

given this effect unless the language of the codicil is as clear and explicit as that of the will to which it relates. (Adams v. Massey, 184 N. Y. 62; Matter of Hoffman, 140 App. Div. 121.) I will therefore hold that the petitioner is entitled to payment of the sum of \$20,000 bequeathed to her under subdivision b of paragraph fifth of decedent's will.

Decreed accordingly.

Matter of the Estate of BENJAMIN ALTMAN, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

WILL—BEQUEST TO EMPLOYEES—CONSTRUCTION.

Where a bequest of a certain sum to each person in the employ of a corporation at testator's death, mentioned in the will, expressly provided that piece workers should not be included, the time spent by a piece worker, as such, who subsequently became a salaried employee of the corporation should be excluded in determining the length of service.

PROCEEDING upon judicial settlement of the account of executors.

Cadwalader, Wickersham & Taft, for executors.

Olvany, Russel & Ingle (George W. Olvany and John Ingle, of counsel), for Mary C. Sullivan and Mary Riley.

FOWLER, S.—Upon the judicial settlement of the account of the executors certain persons claim that they are legatees under the third paragraph of the seventh clause of testator's will. It is therefore necessary to construe this clause in order to determine the validity of those claims. The relevant parts of the paragraph are as follows: "I further give and bequeath

to each of the persons who shall be in the employ of the said corporation of B. Altman & Company at the time of my death and who have been in the employ of my firm and said corporation together for a period of twenty years or more, the sum of \$2,500; to each of such persons who have been in such employ for eighteen years or more, and less than twenty years, the sum of \$1,500, and to each of such persons who have been in such employ for fifteen years or more, and less than eighteen years, the sum of \$1,000, provided, however, that piece workers shall not be included in these several classes."

The claimants herein, Mary C. Sullivan and Mary Riley, were in the employ of the corporation of B. Altman & Company at the time of testator's death. Mary C. Sullivan entered the employ of the testator on October 1, 1894, as a piece worker, and continued in his employ in such capacity until September 25, 1899, when she became a salaried employee. She continued as such salaried employee until the time of the testator's death. Mary Riley was employed by the testator as a piece worker on October 7, 1896, and she continued in that capacity until February 11, 1901, when she became a salaried employee. Piece workers were not paid a regular salary, but received compensation for each piece of work made or completed by them. They worked on the premises occupied by the department store of B. Altman & Company; their hours of labor were regulated by the company, and they were under the control and management of the persons in charge of the store.

Mary C. Sullivan was in the employ of B. Altman & Company as a piece worker and salaried employee for about nineteen years, and as she was in the employ of the corporation at the time of testator's death she would be entitled to receive a bequest of \$1,500 as a member of the second class mentioned in paragraph 3 of clause 7 of the will, if the number of years which she worked as a piece worker may be added to the number that she worked as a salaried employee in determining years of

employment within the meaning of clause 7 of the will. As a salaried employee she was less than fifteen years in the employ of B. Altman & Company and therefore would not be entitled to any bequest unless the years of employment as a piece worker may be added to those as a salaried employee. Mary Riley would be entitled to a bequest of \$1,000 if the number of years she was employed as a piece worker may be added to the number in which she was employed as a salaried employee in ascertaining the total number of years of service within the meaning of paragraph 3 of clause 7 of the will.

It is evident that the testator intended to show his appreciation of the loyalty and efficiency of those of his associates and employees who had been connected with the conduct of his business for a number of years, and that this substantial evidence of appreciation was to be regulated by the number of years of service. Long service would be an indication not only of efficiency as an employee, but also to some extent of personal interest in or identification with the business as distinguished from a merely financial interest. Undoubtedly, it was to show his appreciation of such personal interest in the business that he made the bequests to the employees. Piece workers, however, have not the same general interest in the business that salaried employees have; their compensation is not dependent upon the management's appreciation of their work or the results which they achieve for the business, but upon the amount of work which they do. They are to some extent independent contractors. That the testator did not intend to place them in the same category as salaried employees is manifest from the last clause of the paragraph above quoted. As he expressly discriminated against them and excluded them from the bequests intended for salaried employees of a certain length of service, it is reasonable to assume that he intended to exclude from computation in ascertaining such length of service the number of years in which any employee was employed as a

piece worker. Piece workers being expressly excluded by the language of the will, the time spent by a piece worker who subsequently became a salaried employee should also be excluded. Unless this interpretation of intention be given effect it would be possible for a piece worker who had worked in that capacity for twenty years and had been a salaried employee one week immediately prior to decedent's death to receive a bequest of \$2,500, under paragraph 3 of clause 7 of the will, although the testator expressly states that such legacies are not to be paid to piece workers. I will therefore hold that neither of the claimants is entitled to a legacy under paragraph 3 of clause 7 of testator's will.

Each of the executors will be allowed \$36,322.13 commissions. No commissions will be allowed on the money received by the executors on account of the mortgage executed by them on real estate specifically devised.

Decreed accordingly.

Matter of the Estate of CHARLES KELSEY, Deceased.

(*Surrogate's Court, New York County, March, 1915.*)

ACCOUNTING—SUBSTITUTED TRUSTEE—OBJECTIONS TO PAYMENTS MADE UNDER DECREE OF COURT—COMMISSIONS OF RESIGNING TRUSTEE DEDUCTIBLE FROM CORPUS OF TRUST FUND—RIGHTS OF REMAINDERMEN NOT INVOLVED.

Objection to the payment by a substituted trustee of necessary disbursements in connection with the accounting of his predecessor and of commissions for paying over the trust fund will be overruled in the absence of an allegation that they were improperly allowed by the decree of the surrogate.

Where under the law as it existed at the time the allowance of commissions to a resigning trustee was in the discretion of the court and having been duly allowed to the representative of the resigning trustee

on the value of the trust fund and paid over to the substituted trustee they are properly deductible from the *corpus* of the trust fund.

The substituted trustee not having accounted, the amount of \$500 paid by it to counsel, in a proceeding on the petition of a remainderman for an accounting by the substituted trustee, should be apportioned between income and principal as follows: \$125 to income and \$375 to principal.

An objection to that part of the account which described said remainderman as entitled "to a contingent remainder interest" cannot be considered in the present proceeding as it does not involve the rights of the remainderman as the accounting was only for the purpose of showing the condition of the trust estate and payments made to the life tenants.

PROCEEDING upon the account of a substituted trustee.

Murray, Prentice & Howland (Robert H. Strahan, of counsel), for Equitable Trust Company, as substituted trustee.

Frederic C. Scofield, for William C. Gibson.

William H. Leupp, for Anna K. Barbey, life tenant.

J. Brownson Ker, for contestant, Nellie Kelsey.

FOWLER, S.—The Equitable Trust Company of New York, as substituted trustee under the will of Charles Kelsey, deceased, having filed an account of its proceedings, and objections thereto having been filed by Nellie Kelsey, who claims an interest in the estate as remainderman, the questions raised by the objections are now before the court for determination. The facts are undisputed.

The first objection relates to payments made under a decree of this court to the trustee who was the immediate predecessor of the Equitable Trust Company. These payments were made in April, 1904, and consisted of necessary disbursements in connection with the accounting of the trustee and commissions for paying over the trust fund. It is not alleged by the objectant that the disbursements were improperly allowed by the decree

of this court. The objection to the payment of these disbursements out of the trust fund will therefore be overruled. (Matter of Murphy, 121 App. Div. 426.)

The commissions for paying over the trust fund were allowed by the court and paid to the representative of the accounting trustee. Under the law as it existed at that time the allowance of commissions to a resigning trustee was in the discretion of the court. (Matter of Allen, 96 N. Y. 327.) Commissions having been duly allowed to the representative of the resigning trustee on the value of the trust fund paid over to the substituted trustee, they are properly deductible from the *corpus* of the trust fund. (Woodruff v. N. Y., L. E. & W. R. R. Co., 129 N. Y. 27; Matter of Murphy, *supra*.)

No accounting has been made by the trustee since 1904. The present accounting was filed upon the petition of Nellie Kelsey as a remainderman. Under these circumstances it seems to me that the \$500 paid by the trustee to its counsel in this proceeding should be apportioned between income and principal, and that a reasonable apportionment would be \$125 to income and \$375 to principal.

The objection to that part of the account which describes Nellie Kelsey as entitled "to a contingent remainder interest" cannot be considered in this proceeding, as this is only an accounting by the trustee for the purpose of showing the condition of the trust estate and the payments made to the life tenants, and does not involve a determination of the rights of the remaindermen. The words used in schedule "L" of the account in respect to Nellie Kelsey's interest in the estate are merely words of description; they will not be included in the decree to be entered on this accounting, and do not constitute an adjudication upon her interest in the trust estate. Upon the death of the life tenant the interest of Nellie Kelsey in the trust fund may be determined in any appropriate proceeding.

It appears from the papers submitted to me that since the

filing of the account the participation mortgages to which objection was made have been disposed of, and that the proceeds have been invested in a bond and mortgage which is now held by the trustee as such. This eliminates the second and third objections to the account.

Decreed accordingly.

Matter of the Estate of STANHOPE PREVOST, Deceased.

(Surrogate's Court, New York County, March, 1915.)

ADMINISTRATION—ANCILLARY LETTERS—PROOF OF LAWS OF FOREIGN COUNTRY WHERE TESTATOR DIED AND WHO ENTITLED TO HIS ESTATE.

Where, upon an application for ancillary letters of administration with the will annexed, it appears that the will was established in Peru where it was executed and where testator resided at the time of his death, and the petition does not clearly set forth who is or who are entitled to the possession of the personal property of testator in Peru, competent proof must be furnished of the laws of that country from which the authority of the person entitled to possession of the estate therein is derived.

APPLICATION for ancillary letters of administration with the will annexed.

Lloyd & Maddox, for petitioner.

FOWLER, S.— This is an application for ancillary letters of administration with the will annexed.

It appears that the will was established in Peru, where it was executed, and where the testator resided at the time of his death. (Code Civ. Pro., § 2629.)

As no letters were issued in Peru, the ancillary letters must be directed to the person entitled to the possession of the personal property of the decedent in that country, unless another

person applies therefor and files with his petition an instrument executed by the person so entitled, authorizing the petitioner to receive such ancillary letters. (Code Civ. Proc., § 2631.)

The petition does not clearly set forth who is or who are entitled at this time to the possession of the personal property of the testator in Peru. The powers of attorney, copies of which are submitted, are not given to the petitioner, but to another person. Competent proof must be furnished of the laws of Peru from which the authority of the persons entitled to the possession of the estate in Peru is derived.

As this application relates to personal property, the law of the domicile of the testator governs. In *Matter of McShane* (73 Misc. Rep. 146), it was stated that the right of the surrogate to issue ancillary letters upon a will is confined to the very cases specified in the statute.

Application denied, without prejudice to a renewal of the same.

Application denied.

Matter of the Estate of MARY BERNARD, Deceased.

(Surrogate's Court, New York County, March, 1915.)

TRANSFER TAX—ON SAVINGS BANK DEPOSIT MADE IN 1819—NO PRESUMPTION THAT DECEDENT DIED PRIOR TO 1885—TIME OF DEATH MUST BE ESTABLISHED BY PROOF—MOTION TO VACATE ORDER MADE IN 1911 ASSESSING TAX DENIED.

In 1819 decedent made a deposit of \$47 in a savings bank which he never withdrew and upon the application of the public administrator to whom in 1901 letters of administration were issued an inheritance tax of \$109.18 was assessed in 1911 upon said deposit and accumulated interest. *Held*, that an application to vacate the order fixing the tax

should not be granted unless it was found as a fact that decedent died prior to 1885 when the first inheritance tax law was passed and that no demand for payment of the deposit was made raised no presumption that decedent died before the year 1885.

Where the time of death is material it cannot rest on presumption, but must be established by proof.

APPLICATION by the public administrator to vacate an order fixing tax.

Frank W. Arnold, for petitioner.

Lafayette B. Gleason, for state comptroller.

FOWLER, S.— This is an application by the public administrator to vacate an order fixing tax, entered on the 24th of July, 1911. A similar application made in November, 1911, was denied by this court. The present papers contain little additional evidence.

The decedent deposited the sum of forty-seven dollars in the Bank for Savings in the city of New York in the year 1819, and this deposit was never withdrawn by her. There is no proof that a minor could not make a deposit in a savings bank at that time. Letters of administration were issued to the public administrator in 1901, and forty-seven dollars with accumulated interest was thereafter paid to the city chamberlain. Upon the application of the public administrator a tax of one hundred and nine dollars and eighteen cents was assessed thereon. The present application cannot be granted unless the court finds that the decedent died prior to 1885, when the first inheritance tax law was passed in this State. The failure of the decedent to demand payment of the deposit may be attributed to forgetfulness owing to the comparative smallness of the amount deposited, or to acquisition of a residence or domicile in some distant State. The fact that she did not de-

mand payment would not, of itself, justify the court in presuming that she died some time prior to the year 1885. When the time of death is material it cannot rest on presumption, but must be established by proof. (*Nepean v. Doe*, 2 M. & W. 894.)

Application to vacate order fixing tax denied.

Application denied.

Matter of the Petition of MARY C. HIBBARD, as Administratrix of the Goods, Chattels and Credits Which Were of WILLIAM H. HIBBARD, Deceased, to Render and Settle Her Account.

(*Surrogate's Court, Kings County, March, 1915.*)

CONTRACTS—CLAIM FOR BREACH OF CONTRACT TO INDEMNIFY AGAINST LOSS UNDER A WILL IN CONSIDERATION OF PROMISE TO MARRY—WHEN ORAL PROMISE TO MARRY VOID—DEFENSE OF STATUTE OF FRAUDS AND STATUTE OF LIMITATIONS.

Every oral agreement made in consideration of marriage except a mutual promise to marry is void.

A mother's will provided that in case of the marriage or death of either of her unmarried daughters M and C the share of the one so marrying or dying in certain property devised and bequeathed to them should revert to and vest in the survivor of them. M, upon accounting as administratrix of her husband, whom she married in 1905, presented a claim and the evidence justifies a finding that her husband, in consideration of her promise to marry him, promised that he would in the event of their marriage indemnify her for any loss which she might sustain with respect to a devise to her contained in her deceased mother's will, which did not contain any unlawful restraint of marriage. The husband died in 1913 without having done anything which could be regarded as a fulfillment on his part of said agreement. The claim was resisted on the grounds that the promise of the husband was void under the Statute of Frauds and that the claim was barred by the Statute of Limitations. *Held*, on rejecting the claim, that, if the contract were void under the Statute of Frauds, there would be no need to consider other defenses; if it were good, the claim thereon might be defeated by

the Statute of Limitations; or, if it were good and not so defeated, it might fail, for the absence of damages, upon a finding that the wife could not be subject to loss of her estate under her mother's will.

PROCEEDING upon the settlement of the account of an administratrix.

Van Zandt & Webb, for accountant, claimant.

Henry E. Heistad, for objectors.

KETCHAM, S.—The administratrix presents upon her accounting a demand based upon the allegation that a contract made between herself and the decedent was broken by the latter during his lifetime.

The evidence justifies the finding that the deceased, in consideration of the accountant's promise to marry him, promised that he would, in the event of a marriage between them, indemnify her for any loss which she might sustain with respect to a devise to her contained in her deceased mother's will.

There was no note or memorandum of either of these promises in writing.

Before the time when these promises were exchanged the mother's will had been admitted to probate. In that instrument the testatrix, having three daughters, Mary, the claimant, then unmarried; Carrie, unmarried, and Emma, married, devised a certain estate in land to her daughters equally, and with respect thereto provided, among other things, as follows:

"*Sixth.* In case of the marriage or death of either of my said daughters, Mary L. or Carrie J. Clark, then, and thereupon the share of the daughter so marrying or dying (in the said house and lot '688 A Greene Avenue' and contents), as above devised and bequeathed, shall revert to and vest in the survivor of my two said daughters."

The parties to this promise were married on July 12, 1905. The husband died on September 11, 1913, without having done

anything which could be regarded as a fulfillment on his part of the arrangement above described.

The claim is resisted upon the grounds:

1. That the alleged promise by the husband was void under the Statute of Frauds;

2. That in the will quoted *supra* the provision with respect to the reservation of the claimant's estate in the house and lot devised constituted a condition which was in general and absolute restraint of marriage; that such condition was therefore void; and that, since the claimant's marriage imposed no loss upon her as to the devise in question, the present demand must fail even if it be based upon a valid contract; and

3. That the claim is barred by the Statute of Limitations.

"Every agreement, promise or undertaking is void unless it, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith or by his lawful agent, if such agreement, promise or undertaking * * * is made in consideration of marriage, except mutual promises to marry." (Pers. Prop. Law, § 31.)

In *Hunt v. Hunt* (171 N. Y. 396), it was conceded, and necessarily held, that a compact, which cannot be differentiated from the arrangement apparent in the case at bar, was within the statute. It was further held that the intermarriage of the parties to the contract was not such part performance thereof as to invest a court of equity with the power to decree specific performance.

In the case cited, Judge Werner used words which, though directed to another purpose, still contain a definition of the statute in question which the claimant cannot escape. Of that statute he says: "The most notable feature of the statute above quoted is its simplicity and directness of language. All contracts founded upon consideration of marriage, except mutual promises to marry, shall be void unless the commands of the statute are obeyed. Mutual executory *promises* to marry are

expressly excluded from its operation. All other contracts, founded upon considerations of *marriage*, are as clearly within its terms. These two diverse provisions of the statute, standing in juxtaposition to each other, so plainly disclose the legislative intent as to render construction unnecessary if not impossible. The letter of the law bears its own interpretation."

Other authority that every oral agreement made in consideration of marriage, except a mutual promise to marry, is void, may be found, if needed, in *Matter of Majot* (199 N. Y. 29); *McCartney v. Titsworth* (142 App. Div. 292); *Lamb v. Lamb* (18 id. 250.)

Again, if there were a valid contract between the claimant and her husband, there is no evidence that the time for its performance was defined by them, and it would be a contract to be performed within a reasonable time after their marriage. Unless such reasonable time could be held to be as much as two years, the contract, if assumed to be good in law, would have been broken, and any cause of action upon its breach would have occurred at a time more than six years before the husband's death.

An action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument, must be commenced within six years after the cause of action has accrued. (Code Civ. Pro. §§ 380, 382, subd. 1.)

If it were necessary to fix a reasonable period for the performance of the contract assumed, it would be adjusted with great liberality to the claimant if it were found to be one year from the time of the marriage. The sections of the Code last cited seem to bar the claim and it cannot be saved from the limitation thereof through any exception contained in section 382, subdivision 5, or section 410. As to section 382, subdivision 5, see *Carr v. Thompson*, 87 N. Y. 160; *Libby v. Van Derzee*, 80 App. Div. 494; *Campbell v. Culver*, 56 id. 591;

Exhorn v. Exhorn, 1 id. 124; Oakes v. Howell, 27 How. Pr. 145.

The breach of the husband's contract was complete when the time for performance passed without fulfillment, and demand was not necessary to a cause of action which depended alone upon such breach. Hence section 410 of the Code cannot be applied. (Glover v. National Bank of Commerce, 156 App. Div. 247.)

In view of the disposition made of the other questions presented, this court will discharge its full duty if it shall formally find that the will of the claimant's mother did not contain an unlawful restraint of marriage. This conclusion would not require any finding of fact were it not that evidence has been given as to the circumstances and relations of the testatrix from which it may be argued that a construction of the will in part depends upon a question of fact. If for the purpose of review the claimant shall desire a finding of such fact the same will be made.

This is a case in which the parties may properly ask for specific findings. The provision of the Code that a surrogate's decision in writing shall direct the decree to be entered and need not, except for such direction, contain either the facts found or the conclusions of law (Code Civ. Pro. § 2541), must commend itself to the plain man who finds pleasure in seeing one word, if sufficient, grow where a thousand grew before, but the concise direction for judgment should not be used where concurrent claims or defenses may be possibly supported or defeated in the alternative, or the determination as to a claim is that it is subject only to one or more of several defenses and is not subject to the others.

Here, if the contract were void under the Statute of Frauds, there would be no need to consider other defenses; if it were good, the claim thereon might be defeated by the Statute of Limitations; or, if it were good and not so defeated, it might

fail, for the absence of damages, upon a finding that the wife could not be subject to loss of her estate under her mother's will.

The claim is rejected and the findings may be so framed that the facts and conclusions indicated in this opinion shall specifically appear.

Decreed accordingly.

Matter of the Petition of JAMES S. BEARNS to Prove the Last Will and Testament of JOSEPH H. BEARNS, Late of the County of Kings, Deceased.

(Surrogate's Court, Kings County, March, 1915.)

WILL—DOCUMENT INCORPORATING AT LENGTH EARLIER INSTRUMENTS WHICH TESTATOR DECLARED HE COULD NOT FIND BUT DID NOT REVOKE—PROBATE GRANTED.

A paper offered for probate as decedent's last will opened with a recital by him that he had earlier made his last will and testament and several codicils thereto; that he could not find them; that he had not in any manner revoked them, and that the following, incorporating the earlier instruments, are copies of said last will and testament and codicils. The document then closed with the following: "Now, therefore, I, the said Joseph H. Bearns, do hereby re-publish the said last will and testament and said codicils thereto, and do hereby declare the same to be my last will and testament and codicils thereto." The testator's signature appeared at the end of the paper and the usual attestation clause was subjoined, signed by three witnesses.

Held, that it appearing that the instrument was subscribed, declared and attested in the full form required for the execution of a will, it is entitled to probate.

PROCEEDING upon the probate of a will.

Rudolph F. Rabe (John F. Clarke, of counsel), for proponent.

John G. Snyder (Percival H. Gregory, of counsel), for contestant.

William C. McKee, for Brooklyn Bureau of Charities, legatee.

Coombs & Whitney, for St. James Church, legatee.

Low, Miller & Low, for St. Christopher's Hospital for Babies, legatee.

Wood, Cooke & Seitz, for Brooklyn Children's Aid Society, legatee.

J. Mayhew Wainwright, for American Society for the Prevention of Cruelty to Animals, legatee.

Jacob I. Bergen, special guardian for Selina Bearns, Melville H. Bearns and Ruth Lillia Bearns, infants.

KETCHAM, S.—The only question presented is whether or not the propounded paper is a will.

It opens with a recital by the decedent that he has earlier made his last will and testament and several codicils thereto; that he cannot find them; that he has not in any manner revoked them and that the following are copies of the said last will and testament and codicils. Copies of the earlier instruments thus identified are then incorporated at length. The document then closes with the following:

"Now, therefore, I, the said Joseph H. Bearns, do hereby re-publish the said last will and testament and said codicils thereto, and do hereby declare the same to be my last will and testament and codicils thereto."

The signature of the alleged testator is at the end of the paper, and a clause of attestation is subjoined in these words:

"The foregoing instrument was signed, published and declared by Joseph H. Bearns, the testator, as and for his last will and testament, and as and for the codicils to his last will and testament in our presence, and thereupon we, at his request and in his presence and in the presence of each other signed our names as witnesses hereto."

At the end of the clause last quoted appear the names of three witnesses, with a statement of their residences, respectively.

From its face and the testimony of these witnesses it will be found that the instrument was subscribed, declared and attested in the full form required for the execution of a will.

That the signatory of this paper intended to make a will and believed that he was making one is manifest. Not only does his subjective intention appear, but any sane person will know from the terms of the paper just what it was that the supposed testator meant to accomplish by a will. Where both the fact of testamentary purpose and the explicit nature of the testamentary scheme are so plain that the wayfaring man, though a fool, need not err therein, it only remains to determine whether the law so far partakes of the wayfarer's affliction that it cannot see what everybody else can.

In such case all the cunning of construction may be justly employed to infuse the language known to have been used in a testamentary endeavor with an interpretation which will give life and effect to a worthy purpose.

The supposed testator republishes his former will and codicils. This is not the kind of republication which the law has in mind when it provides that a will may be republished. This it could not be, for the transaction did not in any point conform to the legal requirements of republication, and it cannot be presumed that the decedent intended his act to be ineffectual.

Where a word under construction yields no force when limited to one definition, but would show forth a clear value if lighted up by another, it is, at least, permissible to inquire

whether the more hopeful definition will apply, and clearly, if it then be found that in one meaning the word would endanger a solemn instrument which the other meaning would rescue, the interpretation must be adopted which will save, and not destroy.

In the narrow sense to which the law confines the word, the mere act of making the former will and codicils was published at the time when they were made. But to publish is to declare, to tell, to display, to put in print or writing for the people to read. In this usage the substance of the former instruments formed a record and declaration of a complete scheme for the disposition of the decedent's estate intended to be read in the event of death.

Since, then, it is impossible to effectuate the supposed testator's republication as a transaction directed merely to his earlier acts of testation, the inquiry is forced as to whether he may not have meant, when he republished his will and codicils, that he repeated, confirmed and adopted anew the provisions which they contained and made them the text and evidence of the scheme of a present will.

To republish, long before it was strained from its normal meaning to the narrower uses of the law, meant only to publish again, to repeat, to tell anew, to declare a second time. It sometimes means to reprint, as in the case of the reproduction of a written work, to print and utter a new edition.

There are only a few means, well defined, by which a man may so proceed that his act will constitute a republication of the *factum* of an earlier will. The transaction now under review contains no single feature which conformed to the ceremony of republication as legally defined. It did fit into and reproduced all the elements of a republication in either the popular, literary or original meaning of the word.

When it is obvious that the supposed testator could not have used the language: "I do hereby republish my will which has been lost," with the intention of availing himself of the legal

doctrines of republication, it becomes an urgent and welcome duty to adjust his words to any appropriate interpretation which will reveal what is known to have been in his mind, however obscured in misfit phrases. "The letter killeth, but the spirit maketh alive."

It is believed that a just construction of this will is that the testator, when he executed the propounded paper, incorporated therein as his will all the terms and directions contained in the earlier instruments.

The instrument is found to be the last will and testament of the decedent, and as such is admitted to probate.

Probate decreed.

Matter of the Application of SOPHIE KIRCHNER for a Decree Revoking Letters of Administration Issued upon the Estate of ANN ELIZABETH GIMPEL to LOUIS GIMPEL and JOHN HENRY GIMPEL, as Administrators.

(Surrogate's Court, Kings County, March, 1915.)

ADMINISTRATION—REVOCATION OF.

It is dishonesty on the part of the sons of decedent, now her administrators, to take from her for themselves and a sister to the exclusion of another sister all the property their mother had at a time when her competency was questionable and to avail themselves of her willingness to give away all she had and to so distribute it that one of her children was disregarded, and letters of administration granted to said sons will be revoked.

APPLICATION to revoke letters of administration.

Aron & Vanderveer, for petitioner.

Kiendl & Sons (Theodore Kiendl, Jr., of counsel), for respondents.

KETCHAM, S.— The letters of administration will be revoked.

It was dishonesty on the part of the two sons of the decedent, now the administrators, to take from their mother, for themselves and a daughter of the decedent, to the exclusion of another daughter, all the property which she had, under the circumstances established with respect to her mental weakness and dependence.

If the condition of health into which she had fallen in her old age was not enough to demonstrate her complete incompetency to understand and manage her affairs, it was still dishonesty, at a time when her competency was seriously questionable, to avail themselves of her willingness to give away all that she had and to distribute it among themselves and their sister in such a way that one of her children was disregarded.

The mother's gifts were made to three of her sons and daughters, while they had access, opportunity and incentive to profit by her improvidence. At the same time the daughter to whom she gave nothing was without opportunity to impress her needs, her claims or her desert upon the mother.

Of the children who have partaken of the decedent's inconsiderate generosity, two have taken administration upon her estate without any assignable motive, unless it be to intrench themselves against such legal attack as their conduct during the decedent's lifetime would naturally invite.

There will be no finding that the transfers of property made by the decedent were obtained at a time when she was mentally incompetent or that they were induced by abuse of the dependent relation which she bore toward those who got her property. A sufficient basis of the decree of revocation will be that the transfers were made by one who was in physical and moral dependency upon those who made gain from her infirmity, and that her mental condition was such that it was dishonesty to make use of it to obtain all her property.

A further ground for the decree is that the administrators'

own interest is hostile to the safety and welfare of the estate in every substantial respect.

Beyond the fifty dollars which has been taken into the care of the administrators, upon their allegation that nothing else was left by their mother, there is no need for their remaining in office.

The assertion and maintenance of control over an estate under these circumstances is said to be misconduct. (Matter of West, 40 Hun, 291; *affd.*, 111 N. Y. 687; Matter of Gleason, 17 Misc. Rep. 510; Matter of Wallace, 68 App. Div. 649; Matter of Stallo, 82 Misc. Rep. 135; reversed on grounds not material to this discussion, 209 N. Y. 567.)

The petitioner may take a decree revoking the respondents' letters and directing them to render and settle their accounts.

Decreed accordingly.

Matter of the Petition of ESTHER OLSEN to Render and Settle Her Account as Administratrix of the Estate of CHARLES OLSEN, Deceased.

(*Surrogate's Court, Kings County, March, 1915.*)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—FUND COLLECTED IN COMPROMISE OF ACTION UNDER FOREIGN STATUTE—DIVISION OF PROCEEDS.

The account of an administratrix reported a fund collected by her in compromise of an action brought in England against the corporate owners of the steamship *Titanic* to recover damages for alleged negligence in causing the death of her intestate. The action was brought under a statute (9 & 10 Vict. chap. 93, § 2) which declares that every such action shall be for the benefit of the wife, husband, parent and child of the deceased. The intestate was survived by his wife, the administratrix herein, and one child. *Held*, that the fund must be divided equally between the wife and child, in accordance with the statute under which said action was brought.

PROCEEDING upon the settlement of the account of an administratrix.

William C. McKee, for administratrix.

Franklin M. Tomlin, special guardian for Arthur Olsen, an infant.

KETCHAM, S.—The accountant's intestate lost his life in the wreck of the steamship *Titanic*, leaving his wife, who is the administratrix, and a child.

An action was brought in England against the corporate owners of the ship to recover damages for alleged negligence causing the intestate's death. The account reports a fund which was collected by the administratrix in compromise of that action.

The English statute provides for the maintenance of an action for death caused by "wrongful act, neglect or default," and then provides as follows:

"Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively from whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." (9 & 10 Vict. chap. 93, § 2.)

The accountant asks that these damages be distributed, two-thirds to her and one-third to her child.

The foreign statute alone created the right from which the

fund proceeds, and it alone must supply the basis for its division. (Taylor v. Taylor, 232 U. S. 363.)

That statute contains no explicit direction for the disposition of the damages when the same are collected without a trial. It does, however, provide that the action therein authorized shall be for the benefit of the "wife * * * and child."

It is, therefore, undeniable that the fund which the compromise yielded is not a part of the general estate and is held under a trust for those whose claims in a recovery by trial would be a proper subject of adjustment by the jury.

When the only persons interested are the decedent's wife and child, it must be that each would have been awarded a substantial fraction of any verdict. The only definite direction contained in the act as to the disposition of the damages is here inapplicable, and the remaining question, therefore, is, What direction for disposition can be implied from the statutory declaration that the action shall be for the benefit of the wife and child?

It is argued by the guardian that since the administratrix did not bring her action to trial and obtain from the jury a direction for the distribution of the damages, she waived any right she might have to more than one-third of the fund which would be hers if the New York Statute of Distribution should control.

The trouble with this suggestion is that the Statute of Distribution has nothing to do with the case.

If the law of this State provided that in intestacy the child or children should receive all the personal estate of the intestate, could it be possible that in the application of the English statute, which in creating the property right expressly declares the widow a beneficiary thereof, she could be wholly excluded? Is it not a fallacy to apply our Statute of Distribution in cases of intestacy to a fund to which that statute has no application?

That the fund must be divided between the wife and child is plain from the only statute which can be considered, and it is

equally plain that the only division contemplated is such as will be just and practical. If two persons are beneficially entitled to the enjoyment of a fund and nothing is known of the proportion of their claims thereto, there can only be an equal division.

There is no circumstance to show that the rights of the participants in this fund are disproportionate. At the time of the decedent's death the widow was twenty-four years of age. The child was nine years of age. The general estate accounted for is \$547.23, and the amount realized upon the compromise is \$2,222.09. These facts do not deter the mind from equal division.

The expenses of the accounting should be borne generally by the general estate. The allowance to the special guardian, seventy-five dollars, should be charged upon the special estate.

Decreed accordingly.

EMIL HEUEL, as Executor, etc., of CONRAD STEIN, Deceased, Plaintiff, v. ALEXANDER STEIN, as Executor, and JOSEPHINE STEIN, as Executrix, etc., of CONRAD STEIN, Deceased, and Others, Defendants.

JOSEPHINE STEIN UTERHART and CARL J. STEIN, Appellants;
EMANUEL J. MYERS, Guardian ad Litem, Respondent.

(Supreme Court, App. Div., First Department, December 11, 1914.)

WILL—ACTION FOR CONSTRUCTION—JUDGMENT VALID, ALTHOUGH IMPROPER PERSON APPOINTED GUARDIAN AD LITEM—GUARDIAN AD LITEM WRONGFULLY APPOINTED NOT ENTITLED TO COMPENSATION—WHEN COURT MAY COMPEL GUARDIAN AD LITEM TO REPAY MONEYS RECEIVED FOR SERVICES.

Where, in an action for the construction of a will, there is a substantial contest between two sons of the testator and four other children who are infants, an attorney who, by means of a misleading affidavit, is

appointed guardian *ad litem* for the infants, and appears on the trial of the action in behalf of all of the defendants, although the other members of his firm are attorneys for the two sons, is not entitled to payment out of the estate of the infants for his services as guardian *ad litem*, because he was not a competent person to be appointed, within the provisions of rule 49 of the General Rules of Practice.

The appointment of such a person as guardian *ad litem* was not void, however, and the judgment entered was binding upon the infants as well as the adult heirs of the testator.

Where, on a motion for an order revoking and setting aside any provisions made for the compensation of such a guardian *ad litem*, it appears that the attorney after being denied an order fixing his compensation under rule 50 of the General Rules of Practice, procured payment from the executors of the testator, without an order of the court, which was allowed upon a subsequent accounting, the decree of the surrogate is *res adjudicata* as between the executors and the heirs, but is not conclusive as between the attorney and his former wards, and, hence, the court may require him to repay the sum which he received from the executors as compensation, with interest, under the provision of the notice of motion asking for "such other and further relief as may seem to the court just and proper."

CLARKE and DOWLING, JJ., dissented, with opinion.

APPEAL by Josephine Stein Uterhart and another from two orders of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 18th day of November, 1913, denying their separate motions for an order revoking, canceling and setting aside any provisions heretofore made for the compensation of Emanuel J. Myers, as guardian *ad litem* herein, and requiring him to make restitution of the amount already received by him.

Frederic R. Coudert, of counsel (Uterhart & Graham, attorneys), for the appellants.

Emanuel J. Myers, respondent, in person.

INGRAHAM, P. J. — This action was commenced in the summer of 1900 by one of the executors of the last will and testa-

ment of Conrad Stein, deceased, to obtain a construction of the will and to determine what real property was devised to the defendants, Alexander Stein and Conrad Stein, two sons of the testator, by the will. In addition to these two sons, the testator left him surviving four children who were infants. These two sons claimed that under the will they were entitled to several pieces of real property, which the plaintiff, as one of the executors of the will, disputed. The substantial contest, therefore, was between these two sons, on the one side, and the four infants, on the other.

On August 24, 1900, the complaint was served upon the firm of Myers, Goldsmith & Bronner, who admitted service of the complaint as attorneys for the defendants. Josephine Stein, the widow of the testator and the mother of the four infants, two of whom were over fourteen years, and two of them under fourteen years of age, presented a petition to the Supreme Court, executed by herself as the general guardian, and by the two infants who were over fourteen years of age, asking that Emanuel J. Myers, of the firm of Myers, Goldsmith & Bronner, be appointed as guardian *ad litem* for the infants. With that petition Mr. Myers presented an affidavit stating that he was an attorney and counselor at law, residing in the city of New York, that he had no interest adverse to those of the four infants, who desired to have him appointed as guardian *ad litem*, and that he was not connected in business with any attorney or counsel whose interests were adverse to those of said infants. On that petition and affidavit on the 6th of September, 1900, the court appointed Mr. Myers as guardian *ad litem* of said infants. Mr. Myers, as guardian *ad litem*, interposed an answer for the infants, alleging that they and each of them were strangers to all and singular the things set forth in the complaint in this action, saving and excepting they were children of Conrad Stein, deceased, who died, leaving a last will and testament, and that they were severally infants under the age

of twenty-one years, and claimed such interest in the premises as they were severally entitled to, and the said defendants by their guardian *ad litem* submitted their several rights and interests in the matters in question in this action to the protection of the court. This answer was signed by Emanuel J. Myers, as guardian *ad litem* of the infants. The defendants, Alexander Stein and Conrad Stein, served an answer to the complaint, claiming they were entitled to certain real estate as devisees of the testator, and that answer was subscribed by Goldsmith & Bronner, as attorneys for the defendants, two of the partners of Emanuel J. Myers. So far as appears from the record, the rights of these infants, as against their two brothers, were not insisted upon at the trial. Emanuel J. Myers, although guardian *ad litem* for the infants, seemed to have appeared upon the trial on behalf of all of the defendants and to have tried the case for them. In his answering affidavits he states that it was understood that Judge Gross should appear for and represent Josephine Stein as executrix and individually, and Alexander Stein as executor; that Goldsmith & Bronner should appear for and interpose an answer in behalf of Alexander Stein's and Conrad Stein's individual interests, setting up their construction of the devise and bequest in the will; that A. C. Cropsey, who was associated with Judge Gross, should appear for and interpose an answer for Josephine Stein, individually and as testamentary guardian for the infant children of the testator, and that Emanuel J. Myers should appear as guardian *ad litem* for the infant children of the testator. He then stated it was understood and believed that the interests of these parties were not adverse, inimical or hostile, and that the evidence which would be interposed in behalf of the defendants would be the same, and that the oral evidence to be submitted was showing the nature, character and extent of the brewery plant, as it was considered that it was the express wish of the testator, as stated in the will, that his sons should carry on the

business. He further stated that Judge Gross desired him to prepare and conduct the trial of the cause, and in particular this question of the identity of the property constituting the "Brewery Business," in view of his special knowledge of the "Brewery Plant," and that all of the questions raised by the complaint were to be fairly presented to the court with the view that the will should be fairly, honestly and impartially construed in the light of all circumstances showing the nature and character of the estate and throwing any light on the testator's intention in the "devise of the brewing business." The cause was tried at the Special Term of the Supreme Court, presided over by Mr. Justice BISCHOFF, who rendered a decision sustaining the position taken by Judge Gross and Emanuel J. Myers as to the validity of the trusts contained in the will, that Mrs. Josephine Stein was not required to elect but entitled to her right of dower as well as to the testamentary provisions, and further deciding that certain real estate was part of the brewery business, and against the contention of Alexander Stein and Conrad Stein, which had been argued by Mr. Myers, although opposed to the interests of his wards, as to the four vacant lots and the foreman's house claimed by them as part of the "brewery plant."

It is quite clear upon this record that Mr. Myers was not a competent person to be appointed guardian *ad litem*, within the provisions of rule 49 of the General Rules of Practice. His firm had appeared for Alexander Stein and Conrad Stein, whose interests were distinctly adverse to those of the infants, and his affidavit, upon which he was appointed guardian *ad litem*, was, to say the least, misleading. The will of the testator was indefinite as to the real estate which was included in the devise to these two sons, and these two sons' claim to certain real property of the testator as included in the devise to them was adverse to those of the other children of the testator, as they would have an interest in all of the real estate which the

testator owned, which was not included in the bequest to these two sons. I agree, however, with my brother CLARKE that this did not make the appointment of Mr. Myers as guardian *ad litem* void and the judgment thus entered would bind the infants as well as the adult heirs of the testator. (See Parish v. Parish, 77 App. Div. 267; 175 N. Y. 181.)

Mr. Myers then made two applications to the Supreme Court for an order fixing his compensation, under rule 50 of the General Rules of Practice, but neither of the applications resulted in an order in compliance with such rule, and, therefore, it would appear that Mr. Myers was not entitled to receive any compensation as guardian *ad litem*, and, if the facts submitted had been before the court on these applications, it is clear that no award would have been made. It is also clear that Mr. Myers rendered no services to the infants as against the claims of their brothers to these pieces of real property. What he did was to appear as counsel for the adult defendants. So Mr. Myers was entitled to no payment out of the estate of the infants for his services as guardian *ad litem*.

Having failed to obtain an order which would justify such a payment, he persuaded the executors of the testator, without any order of the court, to pay him the sum of \$5,363.90. That money seems to have been paid out of the general assets of the estate as at that time no property had been set apart for the infants. Subsequently, however, the executors presented to the surrogate an accounting of their proceeding, in which these infants were parties, represented by guardian *ad litem*. In that accounting there was a credit claim for this payment of \$5,363.90, to Mr. Myers, as guardian *ad litem*. I cannot find that the decree of the surrogate is a part of these proceedings, but it is stated that the decree contained a provision that the said sum of \$5,363.90, paid to Emanuel J. Myers as guardian *ad litem* of the infant children, should be paid out of "the several distributive shares of the said Josephine Stein, the

younger, Paula Stein, Ella Stein and Carl Stein, in equal proportions, share and share alike, when the trust period expires at the majority of the youngest child, Carl Stein, or his death before majority." We must assume that this decree of the surrogate is *res adjudicata* as between these parties, and that as between the infants and the executors the infants are chargeable on the final distribution of the estate with the proportionate amount of this sum of money, illegally and improperly paid by the executors out of the estate. But Mr. Myers was not a party to that proceeding, nor was his right to retain that sum adjudicated as between himself and his wards, the infants. Undoubtedly the executors have a right to charge that payment to the wards upon the final distribution of the estate, but there is nothing in this decree, as I view it, that, as between Mr. Myers and the wards, in an adjudication which prevents the court from ordering Mr. Myers to repay to his former wards the money wrongfully paid to him and charged to them on the final distribution of the estate. He stands before this court as an attorney and counselor of this court, and he was appointed by this court as guardian *ad litem* on an affidavit containing statements which were misleading. He acted as guardian *ad litem* through the trial of the action which determined the right of his wards to certain real property, without acting solely for the wards against their brothers who claimed an interest in the real property adverse to that of the wards, and for that he has received from the infants a sum of money to which he clearly was not entitled. Under such circumstances, it seems to me that the authority of this court in its control over its attorneys and counselors at law, when the infants arrive at age and before the final distribution of the estate, is sufficient to require the attorney to repay the sum of money which he has received without legal authority. The notice of motion is that Mr. Myers be required to repay to the executors the amount which he has received from them as com-

pensation for the service rendered as guardian. To grant the motion in this form would be, in effect, to reverse or modify the surrogate's decree, which, as has been said, is valid and conclusive as between the executors and the petitioners. It is not conclusive, however, as between Mr. Myers and his former wards. The notice of motion also asks for "such other and further relief as may seem to the court just and proper in the premises," and under this clause we are in a position to make an order adjusting the rights of the parties all of whom are before the court, which has also before it all the facts in the case. Mr. Myers is not only an officer of the court by virtue of his office as attorney and counselor at law, but in his relation to the infants he was especially appointed as the representative and officer of the court to protect the interests of its wards. He is, therefore, subject to the summary jurisdiction of the court. He has been guilty of procuring, under circumstances which we cannot approve, a large sum of money to which he is not entitled and which has been or must be paid by his wards, who until now have had no opportunity to contest with him the propriety of the payment to him. Under these circumstances it is well within the power of the court to require him to make restitution by repaying to his former wards the sums which he received from the executors as compensation for his services as guardian *ad litem*, with interest. To this extent the motion will be granted, the orders appealed from being reversed, with ten dollars costs and disbursements.

LAUGHLIN and SCOTT, JJ., concurred; CLARKE and DOWLING, JJ., dissented.

CLARKE, J. (dissenting). — *First.* Rule 49 of the General Rules of Practice provides that "No person shall be appointed guardian *ad litem*, either on the application of the infant or

otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party."

In *Parish v. Parish* (77 App. Div. 267), in an action in partition, the attorney for the plaintiffs was a clerk in the office of the firm of lawyers who appeared for the adult defendants and a member of this firm appeared for some of the infant defendants while another clerk in their office appeared for others of the infant defendants as guardians *ad litem*. Mr. Justice O'BRIEN said: "Rule 49 of the General Rules of Practice, having for its object the protection of infants, must, so far as its language is susceptible of extension, be construed in its broadest sense; and so construed, we think the term 'connected in business' with the attorney or counsel of the adverse party, contemplates any kind of business association and, therefore, would include clerks as well as partners. What the rule was intended to secure is the appointment of a guardian who has no business association with those representing adverse interests, so that the infant might obtain the benefit of the free and independent judgment of the one selected to protect his rights. A similar construction, we also think, must be given to the expressions in the rule, 'interest adverse' and 'adverse party.' So construed, the rule is not to be limited to cases wherein, as the result of an adjudication, it has been held that the interests of the infant are or are not adverse; but is applicable as well to cases where the question of whether the interests of the infant are or are not adverse is involved."

On appeal (175 N. Y. 181) CULLEN, J., said: "It may be assumed that as to certain of the guardians, the affidavits show that their appointments were made in violation of the rule, and it may also be conceded that the proper interpretation of those rules should largely rest in the judgment of that court by

which they were formulated. Hence, had the court below on a direct application to vacate the orders appointing those guardians, or on an appeal from those orders, set the appointments aside, we should in no way have interfered with their determination. * * * Doubtless it was the duty of the trial court to appoint as guardian for each of the infants a person competent to protect his interests and not connected with the attorney or counsel for the adverse party."

It is plain, therefore, as it seems to me, that as Goldsmith and Bronner, partners of Mr. Myers, represented Alexander and Conrad Stein, the devisees, who were claiming the whole of the property in controversy, Mr. Myers' appointment as guardian *ad litem* of the four infants was in violation of said rule. The infants' interests required opposition to that of their elder brothers and the maintenance of the proposition that this property should be determined not to have been devised to them but to have passed into the residuary estate, of which the infants were the beneficiaries. Mr. Myers was clearly connected in business with the attorneys of the adverse parties. But the Court of Appeals proceeds: "But who was to determine these facts and qualifications? Plainly, the court to whom the application was made. The order of the court appointing the guardians *ad litem* recites that it satisfactorily appears to the court that the person appointed had no interest adverse to that of the infant defendants and that he was not in business with the attorney or counsel for the plaintiffs or any adverse party. If the court erred in this determination it did not deprive the court of jurisdiction or render the judgment voidable, but, like any other error, was to be corrected only by direct attack, that is to say, by appeal or by motion to set the order aside."

Final judgment was entered in the action in which Mr. Myers was appointed guardian *ad litem*, January 16, 1902. No appeal was taken from the order appointing the guardian

ad litem and no motion was ever made, or is now made, to vacate or set aside said order.

Second. Rule 50 of the General Rules of Practice provides that "It shall be the duty of every attorney or officer of the court to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable. But no order allowing compensation to guardians *ad litem* shall be made, except upon an affidavit to be made by such guardian, if an attorney of the court, * * * showing that he has examined into the circumstances of the case, and has, to the best of his ability, made himself acquainted with the rights of his ward, and that such guardian has taken all the steps necessary for the protection of such rights, to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward."

There is no order of the Supreme Court, which appointed Mr. Myers guardian *ad litem* in this action, fixing or allowing any compensation for his services rendered herein. It is obvious that the language of the rule requiring an order of the court refers to the court in which the litigation was pending, in which the guardian was appointed, where the order appointing him was made and where the services were rendered. This is emphasized by the fact that two applications to the court were made for such an order and that no such order exists. So much of the notice of motion, therefore, as asks for an order revoking, canceling and setting aside any provisions heretofore made herein for the compensation of said Emanuel J. Myers as

guardian *ad litem* must fail because there is no order made herein providing for compensation.

Third. Not having succeeded in obtaining an order fixing his compensation from the Supreme Court, Myers obtained from the executors of the estate of Conrad Stein, without the order of any court, the sum of \$5,363.90. Thereafter, in the Surrogate's Court, in the accounting by the executors of their decedent's estate, said payment was allowed to them and the provision was inserted in the decree passing their accounts, that said sum should be paid out of and from the several distributive shares of the four infants in equal proportion, share and share alike, when the trust period expires at the majority of the youngest child, which period arrived November, 1912. As between the accounting executors and the said infants, who were all parties to the accounting proceedings, said decree is *res adjudicata*, said decree never having been vacated or appealed from and still existing in full force and effect. I am not able to perceive that this court in this proceeding has any power or authority over said final decree of the Surrogate's Court which permits it to make any order in the premises affecting said provision. What is presented here is, whether, upon summary application by way of petition, the Supreme Court has the power to direct an attorney, who was appointed a guardian *ad litem* in a pending litigation in said court in 1900, in a litigation which was concluded by the final judgment entered in 1902, who did not procure an order of this court fixing his compensation for services, but who received such compensation from the executors of an estate upon whose final accounting a decree was entered allowing said payment, to make restitution to the infants, who, by the terms of said decree, are now called upon to pay the amount thereof to the trust estate. I think that the guardian was erroneously paid for his services as guardian, because he never obtained an order of the Supreme Court fixing and allowing his compensa-

tion. But he received payment from the executors, and their accounts showing such payment were passed and approved by the Surrogate's Court. I fail to find upon the facts and circumstances disclosed upon this record warrant for summary proceedings of restitution by order.

The orders appealed from should be affirmed, with ten dollars costs and disbursements to the respondent.

DOWLING, J., concurred.

Orders reversed, with ten dollars costs and disbursements, and motion granted to the extent stated in opinion. Order to be settled on notice.

NOTE ON SPECIAL GUARDIAN.

(See note on Appointment and Qualification of Guardians, 6 Mills Surr. 471.)

Section 2530 of the Code of Civil Procedure was amended by the Laws of 1915, Chap. 315, in effect Sept. 1, 1915, and is now Section 2534 (Surrogates' Code), having been rewritten and the scope enlarged. Authorities governing the old § 2530 apply to the present § 2534.

The only direct grant of authority to a Surrogate's Court to appoint a guardian *ad litem* for an infant is contained in this section and § 2527, which apply exclusively to cases where he has been or is to be cited, or is already a party to a special proceeding. (Matter of Watson, 2 Dem. 642.)

Special guardians are the most important officers of the court. Their responsibilities are much graver than those of a referee. They must act independently of all persons interested in the estate. Family influence should not deter them from a most searching inquiry into all matters of interest to their ward. The solemn assurances of the most respectable executor supplemented by personal statements of his counsel, that of his own personal knowledge the details of the account are lawful and mathematically correct, would not justify these officers of the court in passing a single item of the account, nor any question of law involved without personal examination. They must inquire and investigate and then decide as to all matters in which their ward is interested. Their report to the court should give a full account of all the matters in their charge, stating their conclusions and their reasons therefor and all must be based upon their independent personal investigation. The court is jealous of the rights of infants and will be watchful over them and their property. The special guardian is the arm of the court, and in his person this beneficent

policy of the law is to be executed. They are entitled to fair compensation. (Re Wadsworth's Estate, 6 N. Y. Supp 932, 24 State Rep. 415, Ransom Surr.)

Before the passage of the law conferring upon surrogates the authority to appoint special guardians on the accounting of executors, etc., they possessed inherent authority to appoint guardians *ad litem* to look after and protect the interest of next of kin not appearing who were under the age of twenty-one years and the fact that no statute existed requiring the exercise of this authority did not justify the omission to make such an appointment. (Estate of Tilden, 6 Civ. Proc. 15.)

The surrogate "must" appoint a special guardian where the infant does not appear by his general guardian. Where he appears by his general guardian the surrogate must inquire into the facts and must appoint a special guardian, if there is any ground to suppose the interests of the infant require it. No application for the appointment of a special guardian is needed in such a case; the surrogate may act of his own motion. (Matter of Ludlow, 5 Redf. 391.)

The functions of a special guardian of minors appointed by the surrogate on an application for the probate of an alleged last will and testament, cease with the entry of the surrogate's decree in such proceeding, and he is neither required nor empowered by virtue of his office to represent the infants thereafter. If the interests of an infant need protection in proceedings upon appeal from the surrogate's decree it is the province of the appellate court to appoint for that purpose a guardian *ad litem*. (Estate of Hewitt, 4 Civ. Proc. 57, Rollins Surr.)

A guardian *ad litem* is *functus officio* on the entry of a decree in probate proceedings; in the absence of directions from the appellate tribunal as to his compensation, the surrogate can make no allowance to him for services on appeal. (Estate of Bull, 22 State Rep. 880, Ransom Surr.)

A guardian *ad litem* in a Surrogate's Court employs counsel at his own expense. (Matter of Johnston, 6 Dem. 355, 19 State Rep. 258, Rollins Surr.)

Where, upon the judicial settlement of the accounts of an executor in 1882, no special guardian was appointed for an infant legatee upon whom the citation had been served by publication, her right to demand payment of her legacy did not begin until she had attained her majority; but a proceeding instituted by her in the Surrogate's Court, twenty years after she became of age, to enforce such right is barred by the Statute of Limitations. (Matter of Cooper, 5 Mills Surr. 495.)

The only qualification required of such guardian is that he should be competent and responsible. (Matter of Van Wagonen, 69 Hun, 365, 23 N. Y. Supp. 636.)

When Appointed.—Appointment of a special guardian for an infant party, who does not appear by his general guardian, is properly made upon

the return day of the citation. An earlier application is premature. (Matter of Leinkauf, 4 Dem. 1.)

As to the appointment of a person to protect the interests of a widow who had not been judicially declared insane, but who was of unsound mind, see Matter of Donlon (66 Hun, 199, 21 N. Y. Supp. 114.)

It is the proper practice, where no application is made for the appointment of a special guardian upon the return of the citation, for the surrogate to appoint such a guardian upon his own motion. (Price v. Fenn, 3 Dem. 341; Matter of Ludlow, 5 Redf. 391.)

There is no statutory provision requiring an infant to institute a special proceeding in a Surrogate's Court by a special guardian. (Matter of Watson, 2 Dem. 642, Coffin Surr.)

The provision requiring a surrogate to appoint a competent and responsible person to appear in a special proceeding, as special guardian for an infant party who does not appear by his general guardian, is properly complied with upon the return day of the citation. An earlier application by an infant cited, for such an appointment in his own behalf, is premature. (Matter of Leinkauf, 4 Dem. 1, Coffin Surr.)

It is the proper practice in proceedings to which an infant is a party, where no application is made upon the return of the citation for the appointment of a special guardian, for the surrogate to appoint such a guardian upon his own motion. (Price v. Fenn, 3 Dem. 341, 8 Civ. Proc. 206, Rollins Surr.)

If an infant cited before the surrogate has no general guardian or if the general guardian has interests adverse to the infant, a guardian *ad litem* must be appointed. (Kellett v. Rathbun, 4 Paige, 102.)

The surrogate has power to appoint a special guardian or guardian *ad litem* for a minor, though over fourteen years of age, without the consent of the minor. (Brick's Estate, 15 Abb. 12, Daly Act'g Surr.) In the absence of evidence to the contrary, the regularity of the appointment of a guardian *ad litem* is to be presumed. (Id.)

Although § 2531 recognizes the authority of the surrogate to appoint a special guardian for an infant at the latter's instance that section must be construed, in connection with § 2530, as authorizing such appointment only where the general guardian does not appear, or the surrogate is satisfied that the latter is disqualified to adequately protect the interests of his ward. (Farm. L. & T. Co. v. McKenna, 3 Dem. 219.)

The section does not prevent a surrogate, on his own motion without notice, from appointing a special guardian to appear and protect an infant's interests in a reference for an accounting with an administrator, where the general guardian is removed during the progress of such proceedings. (In re Monell, 19 N. Y. Supp. 360, 46 State Rep. 693.)

The appointment of a general guardian of an infant does not, of itself, revoke the appointment of a special guardian. (Id.)

It is regular to appoint a guardian for an infant without service of a citation or notice, if the infant is personally present and does not object. (*Matter of Seabra*, 38 Hun, 218.)

Appointment of a special guardian for an infant, without service of a citation upon him, held without jurisdiction. (*Davis v. CrandaN*, 101 N. Y. 311.)

A special guardian cannot be appointed until after service on the infant. On the return day without service on the infant, a guardian was appointed who admitted service for the infant, and proofs were taken and an adjournment had. Before the adjourned day, process returnable on that day was served on the infant, and a decree was made on that day without further proofs. *Held*, no jurisdiction was acquired of the infant. (*Pinckney v. Smith*, 26 Hun, 524.)

Where an infant having a general guardian applies to a Surrogate's Court for the appointment of a special guardian, to represent him in a proceeding therein, he must give to the former notice of the application. (*Farm. L. & T. Co. v. McKenna*, 3 Dem. 219.)

It seems that the infant may apply for the appointment of a special guardian. It is only when the application is by a person other than the infant that notice must be given. (*Matter of Ludlow*, 5 Redf. 391.)

If service of the citation was defective, an actual appearance of the ward pursuant to it would give the surrogate jurisdiction to appoint such special guardian. (*Brick's Estate*, 15 Abb. 12.)

Where a will was offered in evidence a grandchild objected that he had not been served with a citation and it appeared that the citation was served by leaving a copy with the mother of such grandchild, then a minor under fourteen years of age; that consent was given by one H. to become special guardian; that an order was made appointing him, and that a decree admitting the will to probate was made by the surrogate. *Held* that, as the infant was not legally served, the appointment of a guardian *ad litem* did not cure the defect, and he has a right to insist on this trial that he was not concluded by the probate of the will. (*Hogle v. Hogle*, 49 Hun, 313.)

An omission to appoint a guardian to take care of an infant's interests in a proceeding to probate a will when the infant has been duly served with citation does not render the decree void, but only voidable at the infant's election. (*Matter of Becker*, 28 Hun, 207.)

The objection cannot be taken by one other than the infant who has consented to the proceeding. (*Estate of Cooper*, 2 How. N. S. 28, *Rollins Surr.*)

It does not follow that an irregular appointment of a special guardian is *per se* ground for setting aside the decree on motion, after the time to appeal has expired. An application of that nature is addressed to the discretion of the surrogate, his decision thereon may be reviewed, and may

be reversed for a clear abuse of discretion. *Story v. Dayton*, 22 Hun, 450.)

The Surrogate's Court has power independently of any express provision of statute or rule of court, to make an allowance to the guardian *ad litem* of an infant party. This power is recognized by the code (17) (now Judiciary Law) and the rules of court, and is not limited by the code to taxable costs. (*McCue v. O'Hara*, 5 Redf. 336, *Livingston Surr.*)

A special guardian who so uses an invalid claim held by him against the real estate he is appointed to sell, as to put the purchaser from him of such claim into possession of the lands and render an action of ejectment necessary by the party lawfully entitled, is liable for the damages so occasioned to the latter. (*Spelman v. Terry*, 74 N. Y. 448; *aff'd* 8 Hun, 205.)

Alleged incompetency of heir where the only heir at law and next of kin of a testatrix successfully traverses the allegation of the petition for probate that she is mentally incompetent to protect her rights, although not judicially declared such, an order appointing a special guardian for her will be revoked so as to enable her to appear in person or by attorney in a probate proceeding. (*Matter of Haynes* [1913], 82 Mis. 228, 143 N. Y. Supp. 570.)

Chapter 18 has not made any material change in the mode of appointing special guardians in proceedings before surrogates. (*Matter of Ludlow*, 5 Redf. 391.)

Special guardian appointed by surrogate in a proceeding before his court, may appeal from a decree therein, as he does not become *functus officio* by the rendition of the decree and the appointment of a special guardian to take the appeal is not necessary. (*Matter of Stewart*, 23 App. Div. 17, 48 N. Y. Supp. 999.)

The statute does not prescribe the qualifications of a guardian *ad litem*, in the Surrogate's Court, but it is a good practice to require the same qualifications as are required of a guardian *ad litem* for an infant defendant in the Supreme Court. No person ought to be selected unless he be the general guardian of the infant, or an attorney of the courts of record, fully competent to understand and protect the rights of the infant, and who has no interest adverse to his, and is not connected in business with the attorney or counsel of the adverse party. He should also be of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct. *Story v. Dayton*, 22 Hun, 450.)

If the guardian has an interest adverse to the ward a special guardian may be appointed. (*Brick's Estate*, 15 Abb. 12.)

The surrogate will not on the nomination of the executor appoint a special guardian to examine an executor's accounts on behalf of a minor. (*Allen's Estate*, 1 Tuck. 69.)

A father should not be appointed special guardian for his minor son unless he is an attorney at law. (*Spicer's Estate*, 1 Tuck. 80.)

MARIE S. BOSTWICK, as Executrix, etc., of HENRY B. STOKES, Deceased, Appellant, v. SARAH E. CARR, as Administratrix, etc., of FRANK W. CARR, Deceased, Respondent, Impleaded with SARAH E. CARR, Individually, Defendant.

(Supreme Court, App. Div., Second Department, December 18, 1914.)

EXECUTORS AND ADMINISTRATORS — ATTACHMENT AGAINST FOREIGN ADMINISTRATRIX UNAUTHORIZED—CODE OF CIVIL PROCEDURE, SECTION 1836A, CONSTRUED.

Section 1836a of the Code of Civil Procedure, providing that "An executor or administrator duly appointed in any other State, Territory or district of the United States, or in any foreign country, may sue or be sued in any court in this State in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued," does not authorize a writ of attachment against an administratrix appointed in a foreign State, so as to permit the seizure of personal property belonging to the estate located in this State.

APPEAL by the plaintiff, Marie S. Bostwick, as executrix, etc., from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 17th day of September, 1914, vacating a warrant of attachment.

Philip J. Ross, for the appellant.

John P. Broomell, for the respondent.

THOMAS, J. — The plaintiff attached personal property in New York belonging to the estate of Frank W. Carr, deceased, who was a resident of New Jersey, where the administratrix was appointed. The appeal is from an order vacating the attachment. The plaintiff would sustain the attachment under

section 1836a of the Code of Civil Procedure,* which is: "An executor or administrator duly appointed in any other State, Territory or district of the United States or in any foreign country may sue or be sued in any court in this State in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued," etc. The status relating to attachments do not in terms authorize such procedure, but it is urged that what they permit concerning a non-resident debtor, section 1836a authorizes respecting his representatives. The contention runs counter to the history of judicial decision in this State and to the existing system of law for the administration of decedent's estates. In the administration of domestic estates, the principle of equality of distribution prevails as to all creditors within the same class. It is equally the general policy of the State to transmit to foreign jurisdictions property here that is under administration there, save that in case of insolvent estates, such of the property may be distributed here to domestic creditors as will give them their *pro rata* share of all the distributable assets. (Code Civ. Proc., §§ 2634, 2635.†) No attempt in terms has been made by the legislature to disturb this fundamental and historic policy. But it is urged that section 1836a has such effect, and in fact it seems so if this attachment is authorized by that section. But that intention is so obscurely indicated as to make its existence incredible in view of the destructive results. The foreign court has jurisdiction of the administration which is recognized by comity so far as the interests of domestic creditors permit, and the provisions of the Code indicate what may be done in that regard. The Code permits in certain cases the attachment of property of non-residents, but

*Added by Laws of 1911, chap. 631. — [REP.]

† Amd. by Laws of 1914, chap. 443; formerly Code Civ. Proc. §§ 2700, 2701. — [REP.]

only such interest in the property as the non-resident has. It would not permit, in an action against an individual, an attachment against property which he holds as a trustee, nor in an action against a foreign trustee would it permit seizure of property which he holds for a specific trust and divert it to the payment of a debt to which it was not applicable. In the present case the administrator does not in effect own the property save for the purposes of administration; that is, to distribute it to creditors and those entitled according to statutes or other expression of the law. As to creditors of the class to which plaintiff belongs, distribution must be *pro rata* if there is not enough to pay all the debts in full. For the purpose of marshaling assets and doing the things incident to distribution, the administrator takes the title, but in its legal quality he is a mere trustee appointed and empowered by law to carry out the commands of the statute. (*Blood v. Kane*, 130 N. Y. 514, 518, 519.) So, the trustee has no property subject to sale on execution or by attachment. Therefore, the plaintiff is seeking by attachment to take from the trustee property appointed by law to the use of all creditors and to sell it as if the administrator had some essential property right in it which he could transfer to one creditor to the exclusion of others. The administrator could not of right apply the property to the payment of the plaintiff's debt, and if he sought to do so it would be recoverable, at least to the extent that the plaintiff was paid beyond his *pro rata* share. But the administration of estates and the distribution of assets is not done through attachment proceedings or in suits brought by individual creditors except, perchance, on occasions of extreme necessity. If the creditor desires to have the assets administered he can apply to the surrogate for that purpose. (Code Civ. Proc., § 2670.*) So the plaintiff is taking what does not belong to him and what the administrator

*Now Code Civ. Proc. § 2596, as amd. by Laws of 1914, chap. 443. — [REP.]

has not the right to yield him, and that too by a process that has no place in the settlement of estates. The legislature never intended such rude departure from usual procedure, such seizure and monopoly of all the assets by one creditor, such wresting from a trustee of trust property and diversion of it, and such usurpation of power to administer estates of a decedent as is committed to courts empowered for that purpose.

The order should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., BURR, RICH and STAPLETON, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of Proving the Last Will and Testament of
HENRY POILLON DUNHAM, Deceased, as Will of Real and
Personal Property.

GEORGE L. DOTY, Appellant; BERTHA F. DUNHAM MYERS,
Respondent.

(Supreme Court, App. Div., First Department, December 18, 1914.)

**EXECUTORS AND ADMINISTRATORS — RIGHT OF EXECUTOR TO WITHDRAW HIS
OBJECTIONS TO A WILL AND TO JOIN IN PETITION FOR PROBATE THEREOF.**

Where an executor after being granted leave to withdraw from a petition for probate and to file objections thereto, discovers that the will is entitled to probate, he should be granted leave to withdraw his objection and to again join in the petition for probate, especially where no letters have been issued and the will will not be presented for probate unless he is permitted to join in the petition.

APPEAL by George L. Doty from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 26th day of June, 1914, denying his

motion for leave to withdraw his objection to the probate of the will of Henry Poillon Dunham, deceased, and to join in the petition for the probate thereof.

Henry M. Earle, for the appellant.

John Willett, for the respondent, Bertha F. Dunham Myers.

LAUGHLIN, J. — The testator appointed the appellant and Henrietta V. Carll executor and executrix of his last will and testament and they duly petitioned for the probate thereof on the 7th day of October, 1912. On the 24th of January, 1913, the appellant applied, on the advice of counsel, to the Surrogate's Court for an order striking his name from the petition as one of the petitioners for the probate of the will, and for leave to file objections thereto. The motion was granted and the order was entered and filed accordingly on the 24th of March, 1913. On the 1st of April, 1913, the appellant filed objections to the probate of the will, principally on the ground that the decedent left a prior will and that the execution of the later will was obtained by undue influence, and that it was doubtful whether the decedent was then of sound and disposing mind. It appears that appellant was unable to find the prior will and that he has become satisfied that it was destroyed by or under the direction of the decedent prior to the execution of the later will; and that appellant is now convinced that the decedent was competent to make the later will, and that there was no fraud, undue influence or duress practiced upon him.

An affidavit made by the widow of the decedent was read in opposition to the motion showing that she filed objections to the probate of the will; that when the hearing was about to be brought on she and the executrix, who is the principal beneficiary under the will, arrived at an agreement by which the will was to be withdrawn from probate and it was to be con-

ceded that the decedent died intestate and that letters of administration were to be issued to her and she was to pay the principal beneficiary under the will the sum of \$2,500; that this settlement was approved by the special guardian of the infant daughter of the executrix who took an interest in the remainder under the will; that the change of attitude on the part of appellant was instigated by Thomas C. Dunham, a brother of the decedent, who is an intimate friend of the appellant, and whose purpose was to procure the co-operation of the appellant as such executor in the management of the corporation known as "Thomas C. Dunham, Inc.," which was controlled by Dunham, but in which the decedent was a stockholder to the extent of sixty shares; that Dunham has entered into an agreement to share in the interest of the principal beneficiary under the will and that the purpose of the application of the appellant was to defeat the settlement negotiated between the widow and the executrix and others; that the appellant has frequently admitted to her that the decedent lacked testamentary capacity and that the will was executed through undue influence and should not be admitted to probate, and that he expressed approval of said settlement; that the appellant has no interest under the will except the bequest of a pair of cuff buttons which she is willing he should receive and that the decree appointing an administrator shall so provide.

It further appears by the affidavit of the executrix that she has agreed to withdraw her application for the probate of the will, and has effected a settlement with the parties in interest, including Dunham, who contested the probate, other than the appellant; but Dunham denies that she has effected a settlement with him, and it appears that an infant was interested under the will and it is not shown that the interests of the infant do not require the probate of the will.

The learned surrogate doubtless denied the application on the theory that the appellant has not acted in good faith, and

while there is some evidence tending to sustain that view, it is not conclusive, and the appellant contends, in effect, that he is desirous of performing his moral duty to the decedent of endeavoring to have the will probated. The settlement which has been negotiated between the executrix and some of the parties in interest affords no justification for the denial of the motion. It appears that one of the parties in interest, at least, denies that he agreed to the settlement, and another appears to be or to have been an infant. The appellant, as an executor named in the will, was entitled to present it for probate and to demand that it be probated if the Surrogate's Court found on due proof that it was validly executed.

I am of opinion that the application should have been granted. The renunciation by the appellant was not executed as prescribed by section 2639, now 2628,* of the Code of Civil Procedure; but it cannot be *more* effective than if it had been so executed. That section provides that a person named as executor may renounce the appointment by executing and filing an instrument as therein prescribed, and that "Such a renunciation may be retracted by a like instrument, at any time before letters testamentary, or letters of administration with the will annexed, have been issued to any other person in his place; or, after they have been so issued, if they have been revoked, or the person to whom they were issued has died, or become a lunatic, and there is no other acting executor or administrator. Where a retraction is so made, letters testamentary may, in the discretion of the surrogate, be issued to the person making it."

It was held in *Matter of Baldwin* (27 App. Div. 506) that this section confers *discretionary* power on the surrogate, and that the court on appeal will not interfere with his *discretion*

* See Laws of 1914, chap. 443.—[REP.]

unless it appears to have been improperly exercised. For the purposes of this appeal we may assume, without further considering the point, that to be the correct rule, and still the order cannot be sustained, for the proper exercise of judicial discretion, if there be any discretion, on these facts required that the executor be permitted to revoke his withdrawal from the petition for probate. The Code provisions are mere statutory enactments of the common-law rule by which an executor had a right to withdraw or revoke a renunciation at any time *before* letters were issued, or at any time thereafter when the estate was without a lawful administrator. (*Matter of Suarez*, 3 Dem. 164; *Robertson v. McGeoch*, 11 Paige, 640; *Codding v. Newman*, 3 T. & C. 364.) No letters have been issued and the will has not been admitted to probate in the case at bar, and it is manifest that the will will not be presented for probate unless the appellant is permitted to withdraw his objections to the application for the probate thereof and to proceed with the application. It is not a question, therefore, as to who shall administer the estate, but whether the will of the testator is to be respected and given effect. The conduct of the appellant in withdrawing from the probate proceedings and filing objections thereto and in subsequently asking to be restored to his original position is doubtless subject to criticism; but he is on the right tack now, and, therefore, the motion should have been granted.

It follows that the order should be reversed, with ten dollars costs and disbursements, and the motion granted, without costs.

CLARKE, McLAUGHLIN, SCOTT and HOTCHKISS, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, without costs.

In the Matter of the Application to Revoke the Letters Testamentary of HENRY DOSCHER and Others, as Executors, etc., of CLAUS DOSCHER, Deceased.

HENRY DOSCHER and Others, as Executors, etc., of CLAUS DOSCHER, Deceased, Appellants; GESINE ENGEL, Individually and as Executrix, etc., of CLAUS DOSCHER, Deceased, and MATHILDA C. BEHRE, Respondents.

(Supreme Court, App. Div., Second Department, December, 31, 1914.)

DECEDENT'S ESTATE—REVOKING LETTERS—PAYMENT BY EXECUTORS FOR LEGAL SERVICES — WHEN SERVICES CHARGE AGAINST ESTATE.

It is well settled that an executor cannot bind the estate by his executory contract made upon a new and independent consideration.

Any expenditure made by an executor under such a contract for services which are for the benefit of the estate is regarded in law as a discharge of his personal obligation only until such expenditure is allowed upon the judicial settlement of his accounts.

Where an executor pays for such services out of the estate before the judicial settlement of his accounts, he but pays prematurely out of the fund appropriated therefor, provided such services and payments receive judicial approval; if such payment is not approved as an estate charge in that the services were not required or the fee was excessive, disallowance, whole or partial, follows, and with it the personal obligation of the executor to reimburse the estate.

Where letters testamentary were revoked simply because the executors had paid out of the estate funds for legal services rendered in the administration of the estate and the surrogate finds that said services were necessary, and there is not even a suggestion that the amount paid was excessive, and there was three times the aggregate amount of such payments in the estate treasury to the individual credit of the executors applicable in the event of disallowance or reduction upon a judicial settlement of their accounts, the decree revoking the letters testamentary will be reversed and the matter remitted to the Surrogate's Court for procedure in accordance with the rule that the necessary expenses of administering an estate may be regarded as a charge upon although not a debt against the estate.

APPEAL by Henry Doscher and others, as executors, etc., from a decree of the Surrogate's Court of the county of Kings, entered in the office of said Surrogate's Court on the 3d day of July, 1914, revoking the letters testamentary heretofore issued to the appellants.

Henry F. Cochrane, for the appellants.

No appearance or brief for the respondents.

JENKS, P. J. — As we read the record, the learned surrogate felt constrained to revocation by the isolated fact that the executors had paid out of the estate funds for legal services rendered in the administration of the estate. The surrogate found that such payments were made for legal services necessarily rendered for the administration of the estate; there is no finding that the amount thereof was excessive, and his opinion indicates that when the payments were made there was in the treasury of the estate thrice the sum of such payments standing to the credit of the individuals personally who are the executors. As the revocation is avowedly upon the proposition that the executors "wasted the moneys of the estate in their hands and have improperly applied the same by taking them to their own use" (Matter of Engel, 83 Misc. Rep. 675), the basis of such revocation must be subdivision 2 of section 2685 of the Code of Civil Procedure. (See, also, Code Civ. Proc. § 2569, subd. 2, as amd. by Laws of 1914, chap. 443.)

We are of opinion that these acts of the executors, when considered with the circumstances at the time of the decree, were not within the purview of the words of the said statute, "having wasted or improperly applied the money or other assets in his hands." It is well settled that an executor cannot bind the estate by his executory contract made upon a new and independent consideration. The reasons for the rule need

not be stated here. It is said by CULLEN, J., writing for the court in *O'Brien v. Jackson* (167 N. Y. 31, 33), that the reason is well stated by HUNT, Ch. J., in *Ferrin v. Myrick* (41 N. Y. 315). But as it is not the theory of the law that the executor personally should pay for services which are for the benefit of the estate, therefore any expenditure by him under such contract for this kind of service is regarded as his discharge of a personal obligation only until the expenditure is allowed upon judicial settlement of his account. (*Dodd v. Anderson*, 197 N. Y. 473; *Matter of Ordway*, 196 id. 95, 98.) If, then, an executor pay for the services out of the estate funds before such settlement, he but pays prematurely out of the fund appropriated therefor, provided the services and the payment therefor receive judicial approval. And the penalty is that if such payment is not approved as an estate charge, in either that the services were not required or that the fee was excessive, disallowance whole or partial follows, and with it the personal obligation of the executor to reimburse the estate.

We can conceive that there can be either payment made ostensibly for legal services, or payment for legal services made in such amounts as on *its face* would indicate waste or improper application of estate moneys, or which taken into consideration with surrounding circumstances, might so indicate. But the case at bar is not within that category, for, as we have said, there is a finding that the services were necessary, there is no finding (and indeed no suggestion) that the amounts paid were excessive, and there was three times the amount in the estate treasury to the individual credit of the executors, applicable in the event of disallowance or of reduction upon judicial settlement.

We think that the words "wasted or improperly applied," as employed in the statute, mean a "squandering or misapplication" of funds of the estate whereby the estate is "lost" or "diminished in value." (*Ayers v. Lawrence*, 59 N. Y. 192,

197.) And we think that the idea of "improperly applied" is like unto that of "wasted." Indeed, in the definition of "waste" just quoted from ALLEN, J., in *Ayers v. Lawrence* (supra), it is seen that he defines "waste" as "misapplication."

The action of the executors in this instance is aptly described in *Shaffer v. Bacon* (35 App. Div. 248; *affd.*, 161 N. Y. 635), when the defendants were retained and rendered legal services: "But while theoretically the estates of deceased persons are administered upon the principle asserted in many cases of which those above cited are types, that the executor or administrator shall personally advance the necessary expense of administration in reliance upon the final decree of the surrogate for reimbursement, yet it is well known that no administrator or executor does in fact thus execute his trust. On the contrary, he pays all necessary expenses of administration out of the trust funds, if he happens to have sufficient on hand for that purpose, with the understanding that if for any reason, upon the final settlement of his accounts, any item of expenditure thus made shall be disallowed by the surrogate, he will be required to reimburse the estate therefor. Indeed, it would be impossible in many cases to secure the services of a competent administrator if he were compelled to personally advance the necessary expenses of administration. Nor is it difficult to imagine circumstances in which the rigid enforcement of such a rule would prove exceedingly prejudicial to the estate; and it is probably in recognition of this latter fact that the tendency of the more recent adjudications is in the direction of a relaxation of the rule. We apprehend, therefore, that the real principle which should govern in cases where the executor is required to expend money in the proper administration of the estate which he represents, is that he 'may disburse and use the funds of the estate for purposes authorized by law, but he may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation

of the testator.' (Austin v. Munro, 47 N. Y. 360.) Or that, in other words, the necessary expenses of administering an estate may be regarded as a charge upon, although not a debt against, the estate. (Fitzhugh v. Fitzhugh, 11 Gratt. 300.) If this rule is adopted, as we think it should be in the present case, it only remains to determine what are proper and necessary expenses of administration." (See, also, Matter of Smith, 111 App. Div. 23, 30.)

I note that section 2692 of the Code of Civil Procedure (as amd. by Laws of 1914, chap. 443), which is new, now specifically authorizes as proper procedure this custom, which the bar well knows has been constantly followed in the administration of estates without judicial interference or criticism whenever the payment has been but essentially premature.

We think that the decision in Matter of Engel (155 App. Div. 467) is neither precedent nor authority for the case at bar. In that case this court thought that it was not essential to revocation of Mrs. Engel's letters that there must be danger of the fund or estate being lost, if the record clearly established that she had been guilty of conduct which rendered her unfit for the discharge of the duties of the office of an executor in that she appeared to have practically abandoned its duties and to have turned them over to her husband, who had intruded himself from the very first in the affairs which the testator had expressly confided to his executors. I quote practically the language of WOODWARD, J., in that case.

I advise that the decree be reversed and the matter be remitted to the Surrogate's Court for procedure in accord with the opinion, but without costs.

BURR, THOMAS, STAPLETON and RICH, JJ., concurred.

Decree of the Surrogate's Court of Kings county reversed and matter remitted to said court for procedure in accord with opinion, without costs.

HENRY N. STEINERT, as Receiver in Proceedings Supplementary to Execution of THOMAS J. WALLACE, Appellant, v. CHARLES H. VAN AKEN and WILLIAM S. McCOTTER, Respondents.

(*Supreme Court, App. Div., First Department, December 11, 1914.*)

EXECUTORS AND ADMINISTRATORS — LIABILITY OF SURETIES ON BOND OF ADMINISTRATRIX — ACTION BY RECEIVER IN SUPPLEMENTARY PROCEEDINGS TO ENFORCE LIABILITY OF SURETIES OF ADMINISTRATRIX FOR FAILURE TO PAY OVER MONEY IN COMPLIANCE WITH DECREE OF SURROGATE — DEFENSE — FRAUD IN PROCURING DEFENDANTS TO ACT AS SURETIES.

Sureties on the official bond of an administratrix when sued by the receiver in supplementary proceedings of the husband of the decedent, to enforce their liability for the failure of the administratrix to comply with a decree of the surrogate, directing the payment of money to the plaintiff on the theory that the judgment debtor was the husband of the decedent, and as such entitled to the money, may plead as a defense that they were induced to become sureties through the false and fraudulent representations of the administratrix and the husband of the decedent.

Other separate defenses examined, and *held*, to be insufficient.

APPEAL by the plaintiff, Henry N. Steinert, as receiver, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of July, 1914, denying the plaintiff's motion for judgment on the pleadings.

George W. Carr, for the appellant.

George B. Class, for the respondents.

LAUGHLIN, J. — After the defendants served an amended answer herein, plaintiff moved for judgment on the pleadings. The motion was granted, and the order was affirmed by this

court, without opinion, the writer, however, filing a dissenting opinion (*Steinert v. Van Aken*, 160 App. Div. 921); but leave was granted defendants to further amend their answer, and pursuant thereto they served a second amended answer. Thereupon plaintiff again moved for judgment on the pleadings and the motion was granted and an opinion was written at Special Term by Mr. Justice GREENBAUM pointing out the insufficiency of the allegations of the answer to constitute the defenses attempted to be pleaded, and leave was granted to defendants to further amend. The defendants thereupon served a third amended answer, and another motion for judgment on the pleadings followed, which was denied by Mr. Justice GUY, who filed an opinion, and this is plaintiff's appeal therefrom.

The defendants have omitted from their present pleading two material defenses which they attempted to plead in the first amended answer, and which, on the appeal from the order granting the motion for judgment on the pleadings, the writer in a dissenting opinion endeavored to sustain as sufficient.

The action is based upon a decree of the Surrogate's Court settling the accounts of an administratrix, for whom the defendants were sureties, and requiring her to pay over to the plaintiff \$19,102.38, with interest thereon from November 17, 1911, and \$2,977.63 casts and disbursements and allowances, and the defendants are sued as such sureties on the official bond of the administratrix. In proceedings supplementary to execution against one Wallace, the plaintiff was appointed receiver, and the decree directed the payment of the money to him in the right of Wallace, who, it evidently appeared before the surrogate, was entitled to the fund on the theory that he was the husband of the decedent and took it under the Statute of Distributions.

In the first amended answer the defendants attempted to allege a defense to the effect that Wallace was not the husband of the decedent and was not entitled to share in the estate of

the decedent, and that by false and fraudulent representations to the effect that he was her husband the Surrogate's Court was deceived, and that the decree, in so far as it direct the payment by the administratrix to the plaintiff, was predicated upon this fraud. The defendants in that pleading further attempted to allege as a defense that a brother of the decedent was not cited, and that, therefore, the decree would not be binding upon him and that the sureties would remain liable to him. By the pleading now before the court the defendants have abandoned those defenses. There is no allegation in the last amended answer to the effect that the decedent's brother was not duly cited, or that Wallace was not the husband of the decedent, or that the Surrogate's Court was deceived with respect to his being her husband. There is a denial of any knowledge or information sufficient to form a belief as to whether he was her husband, but in the fifth defense it is alleged that it was found by the referee, appointed by the surrogate to pass upon the objections interposed to the account filed by the administratrix, that Wallace was the husband of the decedent, and the defendants in that defense now allege that fact, among other facts, as a defense to the action.

The last amended answer purports to plead nine separate defenses, the nature of which is that defendants were induced to become sureties on the bond of the administratrix through false and fraudulent representations made by her and Wallace, acting in concert and in furtherance of a conspiracy between them to wrongfully dispose of the estate and subject the defendants as such sureties to liability for Wallace's debts to the extent of his interest in the estate; that in furtherance of the conspiracy the administratrix and Wallace fraudulently disposed of the assets of the estate and fraudulently induced the defendants to waive the issuance and service of a citation on them in the accounting proceeding; that the decree of the Surrogate's Court was brought about by the fraudulent acts

of Wallace and the administratrix; that the Surrogate's Court was without jurisdiction on account of the fraud perpetrated upon the defendants with respect to the waiver of citation, and also for the reasons that the waiver was executed by them prior to the commencement of the accounting proceeding, and the decree was predicated upon the setting aside of certain instruments which required the exercise of equity jurisdiction, and that Wallace executed a general release to the defendants, which discharges them from liability.

It appears by the complaint that the first appointment of the plaintiff as receiver was on the 1st day of July, 1909, and the receivership was extended to another judgment on the same day, and to four others on the 14th day of October thereafter, and to two others on the 21st day of May, 1910. The first of these dates must be taken as the time when the right or claim on the part of Wallace to a distributive share of the estate of the decedent passed to the plaintiff, for the plaintiff fails to show when the order in supplementary proceedings was served, or when a warrant, if any, requiring the arrest of the judgment debtor was served which would be essential to enable him to claim that the title of the receiver related back of the date of his appointment. (See Code Civ. Proc. §§ 2468, 2469.) The decree of the Surrogate's Court requiring the administratrix to pay the money over to the plaintiff was entered on the 13th day of June, 1912. A receiver in supplementary proceedings takes the legal title to all the personal property of the judgment debtor not exempt from execution; but he takes it only for the benefit of the judgment creditors for whom he is appointed receiver, and of other judgment creditors to whose judgments the receivership may be extended, subject, however, to any rights or defenses existing against the judgment debtor at the time title vests in the receiver, or in other words, he steps into the shoes of the judgment debtor with respect to the personal property. (Kennedy v. Thorp, 51 N. Y. 174; Bostwick v.

Menck, 40 id. 383; *Mandeville v. Avery*, 124 id. 376; *Ward v. Petrie*, 157 id. 301; High Receivers, § 202, and cases cited; Code Civ. Proc. § 2468.) The receiver's title to the property of Wallace carried with it any right Wallace had to sue the sureties on the bond of the administratrix but that right was likewise subject to any defense the sureties had against Wallace arising out of the circumstances attending their becoming sureties. (See *Merchants' Bank v. Weill*, 163 N. Y. 486.) A receiver in supplementary proceedings, however, is not a general receiver for the benefit of all creditors; and although he is vested with the legal title to all the personal property not exempt from execution, he takes and holds the surplus over and above the amount necessary to satisfy the judgment for the creditor for whom he was appointed, and the other judgments to which the receivership may be extended, for the benefit of the judgment debtor, to whom he must account therefor. (*Goddard v. Stiles*, 90 N. Y. 199, 206; *Ward v. Petrie*, *supra*; *Lanigan v. Mayor*, 70 N. Y. 454. See, also, *Matter of Walker*, 157 App. Div. 609.) For the reason that the receivership is thus limited, the receiver is not required to reduce to his possession more than sufficient property to pay the claims of those he represents, and costs; and inasmuch as he is subject to the orders of the court appointing him, it is within the province of the court to stay him from taking possession of more than sufficient property to satisfy the claims he represents. (*Bostwick v. Menck*, *supra*; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 183; *Lanigan v. Mayor*, *supra*; *Crook v. Findley*, 60 How. Pr. 375; *Matter of Wilds*, 6 Abb. N. C. 307; *Goddard v. Stiles*, *supra*.) Any interest which Wallace had in the estate of the decedent passed to the plaintiff on his appointment as receiver the 1st day of July, 1909 (Code Civ. Pro. § 2468); and the sufficiency of the defenses, unless it be with respect to any equity Wallace may have in the property passing to the receiver, is, therefore, to be determined with respect

to the rights of Wallace as they existed at that time. If Wallace had been guilty of fraud at or before the time the title vested in the receiver, which would have been a defense to an action by him against the sureties for the failure of the administratrix to comply with the decree, that defense is, therefore, now available as against the plaintiff. It is equally manifest that the rights which became vested in the receiver could not be affected by any subsequent fraud on the part of Wallace, at least in so far as the property is required to satisfy the claims of the judgment creditors, whom the receiver represents. If all the property passing to the receiver should not be required to satisfy the claims of said judgment creditors, then Wallace would be entitled to the surplus remaining, and with respect to that, the defendants might have an equitable defense based on fraud on the part of Wallace subsequent to the time title vested in the receiver, for if they should, on account of their liability on the bond, be required to pay over to the plaintiff more than sufficient to satisfy the claims of said judgment creditors, they might be without remedy. If the plaintiff is suing for more than is needed to satisfy the claims of the judgment creditors represented by him he is in effect suing for the benefit of Wallace, and if the defendants have a defense against Wallace, even though they have none as against the judgment creditors whom the plaintiff represents, their liability in this action should be confined to an amount sufficient to satisfy the claims of the judgment creditors represented by the plaintiff.

The sureties on the bond of an administrator are his privies, and are concluded by any lawful order or decree of the Surrogate's Court, if obtained without collusion between the administrator and creditors or next of kin. (*Scofield v. Churchill*, 72 N. Y. 565; *Carr v. Breese*, 81 id. 584; *Power v. Speckman*, 126 id. 354; *Deobold v. Oppermann*, 111 id. 531; *Douglass v. Ferris*, 138 id. 192, 201.) It would seem to follow from this general rule that the sureties are not concluded from question-

ing a decree of the Surrogate's Court, in so far as it is in favor of any creditor or of any of the next of kin, who by collusion with the administrator and through fraud have been instrumental in obtaining the decree. If, therefore, Wallace, instead of the plaintiff as receiver, were suing the sureties on their liability on the official bond of the administratrix, they would be at liberty to show that, in so far as the decree directs the payment of money to him, it was the result of fraud and collusion between him and the administratrix. I am also of opinion that they could defend an action brought by Wallace based upon the decree of the Surrogate's Court directing the payment of money to him, upon the ground that they were induced to become sureties through material false representations made by him, at least in so far as the decree is predicated upon a right to share in the estate which he had at the time he so induced them to become sureties. Such a receiver may bring any action to recover the personal property of the judgment debtor which the latter might have brought, but, since a fraudulent transfer by the judgment debtor is good as against him, a receiver may set it aside only to the extent necessary to satisfy the claims which he represents. (*Stephens v. Meriden Britannia Co.*, *supra*; *Bostwick v. Menck*, *supra*.) It is to be borne in mind that this is not an action to recover personal property of the judgment debtor. It is an action in the right of Wallace, as the same passed to the receiver, to enforce, for the benefit of the judgment creditors, the liability of the defendants on the bond. It seems to me, therefore, that by analogy the rule which would obtain if this were an action to set aside a fraudulent transfer by Wallace should be applied here to the extent of not permitting a recovery of more than sufficient to satisfy the claims which the receiver represents and costs, providing the defendants have a defense as against Wallace, for, as already observed, if the receiver were permitted to recover more he would hold the surplus for Wallace, and the defendants

would thus be deprived of the benefit of the defense which they have as against Wallace. A receiver does not take title to property acquired by the judgment debtor subsequent to his appointment, excepting as the receivership may be extended thereto pursuant to the provisions of the Code of Civil Procedure (Matter of Walker, *supra*); and, therefore, the right of the plaintiff to recover against the defendants in favor of the different judgment creditors he represents may differ accordingly as the facts existing at the time of his original appointment and at the respective times of the extensions of the receiverships may differ.

The complaint does not show the amount of any of the judgments, to satisfy which the receiver brings this action; but the bond given by him with respect to each judgment is small, which indicates that only a comparatively small part of the amount which the decree directed the administratrix to pay over to the receiver will be required. None of the defenses pleaded presents the question with respect to the plaintiff's right to recover the entire amount awarded to him by the decree and since the question is not necessarily involved we express no opinion with respect to the binding effect of the decree of the Surrogate's Court on plaintiff's right to recover the entire amount. We have made these general observations to the end that our decision may not be misunderstood.

In the first defense the defendants allege in substance that on or about the 18th day of March, 1909, which was nearly four months before the appointment of the receiver, Wallace and the administratrix conspired to and did induce the defendants by false and fraudulent representations to become sureties. The alleged false representations were that the estate was solvent; that becoming sureties was a mere formality and a neighborly courtesy, involving no risk, and that there was "positively no possible liability which could arise under which the defendants could be made to answer to their loss or detriment

by joining as sureties;" and that the assets were "approximately \$10,000 and the liabilities \$9,000; that the balance of \$1,000 belonged to" Wallace; and it is alleged that Wallace and the administratrix then well knew that the assets of the estate, including a saloon owned by the decedent, amounted to over \$20,000. It is further therein alleged, in effect, that the purpose of Wallace and the administratrix, in inducing the defendants to become sureties, was to enable them to obtain and to dispose of the assets and to render the defendants liable for the debts of Wallace to the extent of his interest in the estate, and that if the defendants had known that the assets amounted to \$20,000 or over they would not have consented to become sureties, and one of them could not have qualified. This defense contains further allegations with respect to the fraudulent transfer of the saloon, and the fraudulent omission to include its value in the assets of the estate; but no facts are alleged showing that the liability of the administratrix, adjudicated by the decree, was increased, or that the accounts of the administratrix were surcharged, or that her liability was in any manner affected, through any fraud perpetrated by her and Wallace in disposing of the assets or otherwise; and there is no allegation that any of the fraudulent acts with respect to the disposition of the assets were performed prior to the vesting of title in the receiver. It is further alleged in this defense that on or about the 24th day of March, 1910, the defendants were induced to sign a waiver of citation for the settlement of the accounts of the administratrix by false and fraudulent representations made by Wallace and the administratrix, pursuant to the original fraudulent conspiracy between them, to the effect that all the claims against the estate had been paid; that the administratrix was ready to file her account; that such waiver was a mere formality; and their liability as sureties would be shortly terminated; and they also allege that the waiver was signed *before* the commencement of the proceedings for the

settlement of the accounts of the administratrix, and because of this they claim, on the authority of *Matter of Graham* (39 Misc. Rep. 226) and *Matter of Gregory* (13 id. 363), that the Surrogate's Court acquired no jurisdiction over them. The sureties were, by virtue of the provisions of section 2728 of the Code of Civil Procedure, entitled to notice of the proceeding. It appears by the complaint that the proceeding for the settlement of the accounts of the administratrix was instituted on the same day that the defendants executed the waiver of citation; and it is alleged after the commencement of that proceeding, on due notice to them, a motion was made to bring them in, and that on that motion it was decided that they were already parties to the proceeding and that a supplemental citation was unnecessary. The point that the defendants were not parties to the accounting proceeding was presented on the former appeal and decided adversely to the appellants. (See, also, *Deobold v. Oppermann*, *supra*.) The only allegations of the first defense not presented by the pleading before this court on the former appeal are that it was fraudulently represented to the defendants that the value of the assets was only approximately \$10,000, whereas it was over \$20,000, and that the amount that Wallace would be entitled to receive was the balance of \$1,000 that would be left after paying the liabilities of \$9,000. By the former pleading it was, on this point, merely alleged that it was represented that the estate was solvent; but there was no allegation that it was not solvent. Of course, the sureties could not escape liability to others because of false representations made to them by Wallace; but so far as any claim is asserted against them by Wallace, or in his right, they may defend on the ground that as to him they are not liable because he induced them to become sureties by false and fraudulent representations. Such a defense is not a collateral attack upon the decree of the surrogate. They could not have prevented

that decree upon that ground. They do not thereby question the liability of the administratrix. They merely defend against this contract liability to Wallace who fraudulently induced them to make the contract. The point that fraudulent representations by Wallace inducing the contract of suretyship in part for his own benefit would alone be a defense to an action brought on the bond by him is not specifically taken in behalf of the sureties; but they have pleaded the facts and we must adjudicate thereon, and in *Casoni v. Jerome* (58 N. Y. 315) it is clearly intimated that the sureties may defend as against one who fraudulently induced them to execute the bond, and I think that intimation is sound for the reason that Wallace was as to his own interest inducing defendants to become surety for his own benefit and as to him they should not be held liable if they were induced to sign the bond by any material false representation. (See Redf. Surr. [7th ed.] § 469; 1 Brandt Surr. & Guar. [3d ed.] §§ 146, 447; 2 id. § 726; *Mendelson v. Stout*, 37 N. Y. Super. Ct. 408; *Moodie and Black v. Penman, Shaw & Co.*, 3 Desaus. Eq. 482.) The only possible answer to this would be, I think, that the false representations were not material; but it cannot be said that a false representation to one subjecting himself to liability to the extent of \$20,000 to the creditors and next of kin that the assets were only \$10,000, when they were over \$20,000 — which required a bond for \$40,000 (see Code Civ. Proc. § 2664) — and that the person making the representation would be entitled to the surplus, which would be only \$1,000, is not material as between the persons thus subjected to liability and the person making the representation.

Fraud vitiates any contract. (*Annett v. Terry*, 35 N. Y. 256; *Roessle v. Lancaster*, 119 App. Div. 368.) The bond bound the defendants of course in favor of creditors and the next of kin who were not guilty of fraud but not in favor of Wallace who perpetrated the fraud. I am of opinion, there-

fore, that this defense is good as against the plaintiff, for he, as already observed, stepped into Wallace's shoes, and his rights at that time were subject to this defense.

The second defense is not good. The only facts therein alleged that have even the semblance of a defense are that the administratrix, after her appointment, married Wallace and petitioned for the settlement of her accounts in her former name, and concealed the fact of her marriage from the court. That was not material to the validity of the decree.

The third defense is quite like the second. It merely alleges that on the death of the administratrix a fraud was perpetrated on the court in the application for letters of administration on her estate by concealing from the court the fact that she was married.

The fourth defense merely alleges that the defendants did not appear before the referee appointed to hear the objections to the accounts of the administratrix and were not cited, and that the court was without jurisdiction. That defense manifestly, for the reason that the defendants were parties to the proceeding and are bound thereby, is without merit.

In the fifth defense it is alleged that it was disclosed before said referee that the saloon had been conducted by Wallace as the reputed owner and that owing to his financial embarrassment it was closed for a period and was then opened ostensibly in the name of the decedent, but conducted by him until her death, and that in the meantime judgments had been entered against him and he was otherwise indebted; that after the death of the decedent Wallace conducted the business ostensibly in behalf of the administratrix and that through fraud and collusion between him and her a sale thereof was effected and fictitious debts were accepted as payment for most of the purchase price and that the sale was without consideration, and that Wallace continued to conduct the saloon ostensibly for the purchaser; that the purpose of Wallace and the administratrix

in so doing was to avoid the application of the value of the saloon business to the payment of Wallace's debts, as would have resulted had it been accounted for and distributed in the right of Wallace, and that they also intended thereby to subject the defendants to liability to the creditors of Wallace "should the frauds be disclosed and result in the surcharging of the account" of the administratrix, who was known to them to be unable to answer for any surcharge of her accounts. The defense here attempted to be pleaded falls short in that there is no allegation that the accounts of the administratrix were surcharged with the value of the saloon or with any other assets fraudulently disposed of by her. There is no allegation as to when these alleged fraudulent acts were performed by Wallace. The defense, therefore, fails as to the plaintiff, for his rights could not be affected by any acts of Wallace after he became vested with the title.

The sixth defense is bad for the reasons assigned for the insufficiency of the fifth. It is therein alleged that the referee and the Surrogate's Court attempted to pass upon the validity of the bill of sale of the saloon and a chattel mortgage, which were attacked on the ground of fraud, and the validity of certain notes and checks against the estate of the decedent and other claims disputed on the ground of fraud. No facts are here alleged showing that the Surrogate's Court attempted to exercise jurisdiction beyond that possessed by it to charge the administratrix with *the value of the assets of the estate*; and the more general allegations that the decree on account of the facts alleged, to which reference has been made, was the result of fraud, collusion and conspiracy are of no avail.

The seventh defense merely asserts that the Surrogate's Court was without jurisdiction to make the decree; but no facts showing want of jurisdiction are alleged.

The eighth defense contains a reiteration of the allegations with respect to the fraudulent disposition of the saloon, and

alleges that it was so disposed of pursuant to the original conspiracy between Wallace and the administratrix, and that the plaintiff was aware of the facts, for his counsel brought them out in the proceedings before said referee, and that the decree in favor of the plaintiff is based on the fraud of Wallace, and of the administratrix in so disposing of the saloon. It is not even here alleged that the accounts of the administratrix were surcharged on account of this alleged fraud, but if they were, the decree would not be based upon the fraud. It merely holds the administratrix liable for the value of the assets of the estate. It is further alleged in this defense that the conspiracy between Wallace and the administratrix "was wholly conceived and partly executed prior to the time when the liens were created, which the plaintiff now seeks to enforce" against the defendants. The defense is pleaded as a complete defense; but in no view would it be a complete defense. If the conspiracy was executed in part prior to the time title vested in the plaintiff, and that had been alleged, it would constitute a partial defense to the extent, if any, that the decree is based thereon.

In the ninth defense it is alleged that the debts of the decedent were paid in full, and that Wallace released the defendants from all liability on the bond by a formal release on the 15th day of January, 1912. Of course, it was not competent for Wallace to release the defendants with respect to any rights vested in the plaintiff. This defense contains other general allegations to the effect that the decree was predicated upon conspiracy, collusion and fraud on the part of Wallace and the administratrix; but no facts with respect thereto are alleged. No facts with respect to the alleged conspiracy are set forth in this defense by reference to any other defense, or otherwise; but it is alleged therein that "the aforesaid conspiracy was wholly conceived and the fraud of" Wallace and the administratrix "was perpetrated prior to the acquisition of

the liens by the plaintiff in the proceedings supplemental to execution." These allegations, therefore, are of no value, since facts showing a fraudulent conspiracy resulting in or affecting the decree are not alleged.

The first defense is good, and, therefore, the order is right and should be affirmed.

INGRAHAM, P. J., SCOTT, DOWLING and HOTCHKISS, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of the Judicial Settlement of the Account of
SUSAN MATILDA WATSON, as Executrix, and WILLIAM H.
HARRIS, as Executor, etc., of MARY C. HOFFMAN, Deceased.

MARGARET H. GALLATIN, Objector, Appellant; SUSAN MATILDA
WATSON, as Executrix; WILLIAM H. HARRIS, as Executor,
etc., Respondents.

(*Supreme Court, App. Div., First Department, December, 31, 1914.*)

**SURROGATE'S COURT — JURISDICTION TO DETERMINE OWNERSHIP OF PROPERTY
NOT IN POSSESSION OF TESTATRIX AT TIME OF HER DEATH.**

The jurisdiction of the Surrogate's Court to distribute the estate of a decedent, and to determine contested claims, does not include the power to try the question of title to personal property not in the possession of a testatrix at the time of her death.

Hence, the Surrogate's Court has no jurisdiction upon an accounting by executors to determine the ownership of personal property alleged to belong to an estate, but which, in fact, was in the possession of one of the executors at the time the testatrix died.

APPEAL by Margaret H. Gallatin, objector, from parts of a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 25th day of July, 1914, settling the accounts of the executors.

Albert Stickney, for the appellant.

Paul R. Towne, for the respondents.

MCLAUGHLIN, J. — Mary C. Hoffman died on December 22, 1911. She left a will, in which she named her daughter, Susan M. Watson, her son, Samuel V. Hoffman, and William H. Harris her executors. The will was admitted to probate and letters testamentary issued to the executors named therein. Samuel V. Hoffman took little, if any, part in the administration of the estate. He became ill in September, 1912, when a committee was appointed of his person and property, and thereafter the estate of the testatrix was administered by the respondents. On May 8, 1913, they filed their accounts for judicial settlement. Objections were interposed thereto by the appellant, a granddaughter of the testatrix. The objections were that the executors had failed to account for a pearl necklace and a ruby ring which it was alleged belonged to the decedent at the time of her death; that the executors had omitted them from the schedule of assets and failed to account for them. There were objections to certain expenditures, but those are not involved in this appeal.

The objections were sent by the surrogate to a referee, who reported in favor of the appellant and surcharged the executors' accounts with the necklace and ring. The surrogate refused to confirm the report in this respect and overruled the objections. A decree of the Surrogate's Court was entered, and from so much of it as overruled the appellant's objections and refused to surcharge the executors' accounts with the two articles named, this appeal is taken.

The fact is not disputed that the decedent, up to within a short time of her death, owned and was in possession of the necklace and ring referred to. Mrs. Watson claimed that her mother gave them to her and she was in possession of them

when her mother died. They were never in the possession of Harris, the other accounting executor. The learned surrogate held, and I think correctly, that the Surrogate's Court did not have jurisdiction to determine, under the facts presented, whether the necklace and ring belonged to Mrs. Watson or to the estate of the testatrix. (See 86 Misc. Rep. 588.)

The Surrogate's Court is one of limited jurisdiction and the surrogate has only such legal and equitable powers as are necessary for the discharge of the duty devolved upon him by statute. He has the power to distribute the estate of a decedent and to determine contested claims, but this does not include the power to try the question of title to articles of personal property which were not in the possession of a testator at the time of his death. (Matter of Schnabel, 202 N. Y. 134.)

The necklace and ring were, as indicated, in the possession of Mrs. Watson at the time the testatrix died. She then and ever since has claimed to be the owner — insisting that they belonged to her and that the estate has no interest therein. She has a right, under such circumstances, before they can be taken from her, to a trial in a court of general jurisdiction.

Without, therefore, passing upon the merits of the claims of the respective parties, I am of the opinion that the decree, in so far as appealed from, should be affirmed without prejudice to the appellant's right to the maintenance of an action to recover for the estate of the testatrix the articles referred to, if she be so advised, with costs to the respondents payable out of the estate.

INGRAHAM, P. J., SCOTT, DOWLING and HOTCHKISS, JJ., concurred.

Decree affirmed, with costs to respondents payable out of the estate, without prejudice to appellant's right to maintain action as stated in opinion.

In the Matter of the Judicial Settlement of the Account of
CAROLINE SOLOMON, as Administratrix with the Will
Annexed of KLARA SIMON, Deceased.

CONGREGATION TALMUD TORAH BETH AVROHOM, Appellant;
CAROLINE SOLOMON, as Administratrix with the Will
Annexed, etc., Respondent.

(*Supreme Court, App. Div., First Department, December 31, 1914.*)

WILL — CONSTRUCTION — SPECIFIC LEGACY.

A bequest of "the mortgage and bond for \$10,000, now held by me against premises on 176th Street," followed by several general legacies payable out of the estate, constitutes a specific legacy, which can only be satisfied by delivering to the legatee the identical thing given and, hence, fails where the decedent never owned such bond and mortgage.

APPEAL by Congregation Talmud Torah Beth Avrohom, from a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 3d day of January, 1914, judicially settling the accounts of Caroline Solomon, as administratrix with the will annexed, and also from the order confirming the report of the referee herein pursuant to which the decree was entered.

Louis Susman, for the appellant.

Frank H. Gerrodette, for the respondent.

McLAUGHLIN, J. — In January, 1909, Klara Simon died, leaving a last will and testament, which bore date January third of the same year. So much of the will which bears upon the question to be considered is as follows:

"*First.* After my lawful debts are paid, I give and bequeath

to the Talmud Thora, of The Bronx, on 146th Street, in the Borough of the Bronx, City of New York, the mortgage and bond for \$10,000, now held by me against premises on 176th Street upon condition that the prayers for the dead be recited therein on all Jewish holidays, and that the said Synagogue maintain the perpetual light customary therein.

"*Second.* I give and bequeath to Mr. Ike, * * * the sum of Ten thousand (\$10,000) dollars.

"*Third.* I give and bequeath to Mrs. Epstein, * * * the sum of Five thousand (\$5,000) dollars.

"*Fourth.* All the rest, residue and remainder of my estate, both real and personal, and wheresoever situate, I give, devise and bequeath to my sister, Caroline Solomon, including certain bonds and mortgages aggregating Sixty thousand, five hundred (\$60,500) dollars * * *."

The will was probated, and as no provision was made in it for an executor, Caroline Solomon, the residuary legatee, was appointed administratrix with the will annexed. She administered the estate and filed her accounts for judicial settlement. Objections were made thereto by the appellant—it being clearly identified as the legatee mentioned in the 1st clause of the will. One of the objections was that the appellant was entitled to \$10,000, payable out of the estate of the testatrix. The objection was referred to a referee, who made a report overruling it. He also made certain other rulings as to a jury trial, which are unnecessary here to consider. An order was subsequently made in the Surrogate's Court, which modified the report as to a jury trial and confirmed the balance of it, and a decree was entered accordingly. The appeal from the decree brings up for consideration so much of it as holds, in effect, that nothing passed to the appellant under the testatrix's will.

I am of the opinion that the decree should be affirmed. The bequest to the appellant was not money or the proceeds of property, but of a certain, definite, specified thing, viz.: "The

mortgage and bond for \$10,000, now held by me against premises on 176th Street." It was a specific legacy. (Crawford v. McCarthy, 159 N. Y. 514; Matter of Hendrickson, 140 App. Div. 388; Matter of King, 122 id. 354.) The thing given could be distinguished from all other property belonging to the testatrix at the time of her death, could be readily identified if it existed, and delivered to the legatee as the particular thing given. This made it, within all the authorities to which my attention has been called, a specific legacy.

It is conceded by the appellant — at least it does not dispute the fact — that the testatrix did not own, at the time the will was executed or at any other time, the bond and mortgage specified in the first clause of the will. Nor did she own a \$10,000 mortgage upon any other property. The subject of the bequest never having been in existence, so far as appears, there was a complete failure of the legacy. (Beck v. McGillis, 9 Barb. 35; McNaughton v. McNaughton, 34 N. Y. 201; Burnham v. Comfort, 37 Hun, 216; Tomlinson v. Bury, 145 Mass. 346.) Such a legacy could only be satisfied by delivering to the legatee the identical thing given. (Beck v. McGillis, *supra*; Matter of Matthews, 122 App. Div. 605; Humphrey v. Robinson, 52 Hun, 200.)

That the testatrix intended it as a specific legacy is apparent not only from the language used in the first clause of the will but also when such clause is read in connection with the second, third and fourth clauses, which are general legacies, payable out of the estate. That she intended to limit the gift to the appellant to the bond and mortgage mentioned is, I think, also evidenced by the fact that in a will made by her on the third of November preceding — which was revoked by the one here under consideration — she gave to the appellant the sum of \$10,000 — a general legacy.

It is undoubtedly true, as contended by the appellant, that in the interpretation of wills, the intention of a testator is to

govern, and where that can be ascertained from the will, then the court can subordinate the language used to the intention, and in such case may reject words and limitations, supply or transpose them to get at the meaning. (Starr v. Starr, 132 N. Y. 154; Williams v. Petit, 138 App. Div. 394; Holt v. Jex, 48 Hun, 528.) But that rule has no application here, because, as already indicated, what the testatrix intended to do was to give, not \$10,000 to the appellant, but the bond and mortgage specified. To hold, because the testatrix never owned such bond and mortgage, that the bequest is, therefore, payable out of her estate, would not only be doing violence to her intention, but making a new will for her.

I am of the opinion the decree is right and should be affirmed, with costs.

INGRAHAM, P. J., LAUGHLIN, DOWLING and HOTCHKISS, JJ., concurred.

Order affirmed, with costs.

In the Matter of the Appraisal under the Transfer Tax Law
of the Estate of CHARLES F. WISE, Deceased.

LESTER D. WISE, Executor and Legatee, etc., Appellant;
WILLIAM SOHMER, as Comptroller of the State of New York,
Respondent.

(*Supreme Court, App. Div., First Department, December 31, 1914.*)

DECEDENT'S ESTATE — RESIDENCE OF DECEDENT — CHANGE OF DOMICILE.

Evidence that a person after buying a plot of land in an adjoining State, went there taking his personal belongings with him, and resided with his son while his house was nearing completion until the date of his death, and repeatedly stated that he intended to make it his residence, and that he had come there to establish a voting residence, is sufficient to establish a change of residence.

INGRAHAM, P. J., and McLAUGHLIN, J., dissented, with memorandum.

APPEAL by Lester D. Wise, executor and legatee, etc., from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on or about the 4th day of May, 1914, adjudging that decedent died a resident of the State of New York.

George H. Fletcher, for the appellant.

Theodore du Moulin, for the respondent.

SCOTT, J. — This proceeding was initiated by a petition of the State Comptroller alleging *inter alia* that decedent at the time of his death resided without the State of New York. Notwithstanding this allegation the appraiser found that he was a resident.

The evidence upon which he arrived at this conclusion was the affidavit and oral testimony of decedent's son. This evi-

dence was to the effect that decedent had resided in the city of New York for many years and was engaged in business there; that he had always voted there when he did vote; that for between three and five years he had resided in an apartment hotel in the city of New York, the furniture of the apartment belonging to his wife; that in the year 1910 he bought a plot of land at Long Branch, N. J., and in April, 1911, went down to Long Branch, taking his personal belongings with him; from that time until the date of his death on September 5, 1911, he resided at Long Branch with his son who lived there; that his house was nearing completion; that he repeatedly stated that he intended to make Long Branch his residence, and said that he had come down there to establish a voting residence. There is no evidence that he ever stayed for a night in New York after April, 1911, or even that he retained the lease of his apartment.

I think that there was sufficient to establish both the *factum* of a change of residence and an *animus*. If decedent moved down to Long Branch and actually lived there, even for a short time, with the intention of making that his permanent residence, it is immaterial that he lived in his son's house instead of his own.

The order appealed from is reversed, with ten dollars costs and disbursements, and the appeal of this executor allowed.

DOWLING and HOTCHKISS, JJ., concurred; INGRAHAM, P. J., and McLAUGHLIN, J., dissented.

INGRAHAM, P. J. (dissenting). — I do not think that upon the facts as they appear in this record the deceased ever acquired a new domicile in New Jersey. He had been a resident of this State for many years, had voted here, and that domicile continued until he had acquired a new domicile. He clearly did not intend to acquire a new domicile at the house of his son,

where his stay was merely temporary pending the completion of the house which he was then building in New Jersey. He never could have acquired a new domicile in the new house, as it was not completed before his death.

I think he, therefore, remained a resident of New York until the time of his death, and that the court below correctly so decided.

McLAUGHLIN, J., concurred.

Order reversed, with ten dollars costs and disbursements, and the appeal of the executor allowed. Order to be settled on notice.

In the Matter of the Judicial Settlement of the Account of Proceedings of CHARLES FRASER and WILLIAM B. BRISTOW, as Executors, etc., of JOHN C. LATHAM, Deceased.

In the Matter of the Claim of HARRY ALLEN for Attorney's Fee.

HARRY ALLEN, Individually and as Executor, etc., Appellant;
ELSIE G. LATHAM, Individually and as Guardian, etc.,
Respondent.

(*Supreme Court, App. Div., First Department December 31, 1914.*)

EXECUTORS AND ADMINISTRATORS — RIGHT OF EXECUTOR TO PRESENT WILL FOR PROBATE AND TO ISSUE OF LETTERS TO HIMSELF — LIABILITY OF ESTATE FOR LEGAL EXPENSES INCURRED BY EXECUTOR IN PROCURING PROBATE AND ISSUE OF LETTERS TO HIMSELF.

It is the right, although perhaps not the absolute duty, of a person named in a will as one of the executors, not only to present the will for probate, but also to insist upon the issue to himself of letters testamentary, and reasonable legal expenses necessarily incurred in good faith in the performance of this right is a proper charge against the estate.

Hence, where one of three executors named in a will is honestly dissatisfied with the method of defense to objections to probate adopted by the attorney employed by the executors, he may employ another attorney and under proper circumstances charge the expense to the estate, although the opposition to the probate failed when it came to trial and the will was admitted practically without opposition.

Legal expenses incurred by an executor in obtaining the issue of letters testamentary to himself are a proper charge against the estate, although he has taken little part in the administration thereof, especially where he has expressly waived and relinquished any claims for fees.

DOWLING, J., dissented in part.

APPEAL by Harry Allen from part of an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 6th day of December, 1913, confirming the report of a referee.

Joseph H. Choate, Jr., for the appellant.

Charles H. Tuttle, for the respondent.

SCOTT, J. — The appellant Harry Allen appeals from so much of a decree of the Surrogate's Court as refuses to allow his claim to be reimbursed out of the estate for legal expenses rendered to him as executor of the last will and testament of John C. Latham, deceased. No question is made by the respondent as to the reasonableness of the amount claimed, the sole question being whether or not appellant is entitled to be reimbursed.

The services claimed fall under two heads, to wit, those rendered to the appellant as one of the proponents of the will, and those rendered in resisting objections to his appointment as executor. Mr. Latham's will named three executors, this appellant and two others. These retained a firm of attorneys to present the will for probate, and they were met with what appeared to be serious opposition to the probate on the part of the widow of the testator. As the contest progressed, appellant became dissatisfied with the manner in which it was being conducted

on behalf of the proponents, and retained another firm of attorneys to assist in the proceeding. Both firms of attorneys thus retained were of high standing at the bar, their relations were cordial, and they co-operated and consulted in the most friendly manner in preparing for trial, which, as they reasonably expected, would be sharply contested. As it happened, however, the opposition to the probate collapsed when it came to trial, and the will was admitted to probate practically without opposition. The widow, however, carried on the contest so far as concerned the issue of letters testamentary to this appellant, and was successful in the Surrogate's Court, the letters being issued only after an appeal to this court, where the order of the surrogate refusing to issue letters was reversed. (Matter of Latham, 145 App. Div. 849.)

It is certainly the right, although perhaps not the absolute duty, of a person named in a will as executor not only to present the will for probate, but also to insist upon the issue to himself of letters testamentary. In so doing he but carries out the expressed wish of the testator, and the legal expenses necessarily incurred in the performance of this right are a proper charge against the estate. The multiplication of attorneys is of course to be deprecated, and the better course undoubtedly is that all of the executors shall be represented by the same attorneys. But when several persons have been named as executors a certain degree of personal and individual responsibility rests upon each of them as to the manner in which any opposition to the probate of the will shall be met, and when one executor is honestly, not capriciously, dissatisfied with the method of defense adopted by the original attorney for the executors, we are not prepared to say that he may not employ an additional and independent attorney. Whether or not he shall be allowed the expense incurred in so doing must depend in each case upon his good faith, the reasonableness of his acts and the benefits accru-

ing to the estate therefrom. In the present case every indication points to appellant's good faith; his action in retaining additional counsel seems to have been reasonable, and we have no doubt that, if the contest had been as bitterly carried on as there was every reason to suppose it would be, the services of the counsel retained by the appellant would have proved beneficial to the estate.

As to the expense incurred in obtaining letters testamentary, that seems to be even more clearly a proper charge against the estate. Again it tends to carry into effect the declared wish of the testator. The fact that since the issue to him of letters testamentary the appellant has taken but little part in the administration of the estate has no real bearing upon the present controversy, especially in view of the fact that he has expressly waived and relinquished any claim for fees as executor. If he has failed in his duty as executor, the proper remedy would be to remove him. The reasonableness of the charges being admitted, we are of opinion that no sufficient ground was shown for refusing to allow them to the appellant.

The decree appealed from should be reversed in so far as it confirms the report of the referee sustaining the objection to the above-mentioned claims of appellant, and disallowing said claims, and said decree is hereby modified so as to overrule said objections and allow said claims, and as so modified is affirmed, with costs to the appellant payable out of the estate.

CLARKE, McLAUGHLIN and LAUGHLIN, JJ., concurred; DOWLING, J., concurred in the allowance of the counsel fee for services rendered in the probate proceedings, but dissented from the allowance of the counsel fee for services rendered in resisting the objections to the appointment of the executor.

Decree reversed and modified as indicated in opinion, and as so modified affirmed, with costs to appellant payable out of the estate. Order to be settled on notice.

ALICE LOUISA RIPLEY, as Executrix, and EMERSON FOOTE, JR., as Executor, etc., of HARRY DILLON RIPLEY, Deceased, Respondents, v. GUARANTY TRUST COMPANY OF NEW YORK, Defendant, Impleaded with ALICE LOUISA RIPLEY, Respondent, and HARRY DWIGHT DILLON RIPLEY, an Infant under the Age of Fourteen Years, Appellant.

(*Supreme Court, App. Div., First Department, December 31, 1914.*)

WILL — TRUST — SUSPENSION OF POWER OF ALIENATION — WHEN INVALID TRUST PROVISION MAY BE DISREGARDED — DISPOSITION OF INCOME DURING TRUST TERM.

A testator conveyed certain property by deed to trustees in trust to pay out of the principal or income certain charges and apply the surplus income to his use during his life, and upon his death convey the principal, together with any unexpended income as he should direct by his last will and testament. Thereafter the testator executed a will providing that the principal should be held by his executors as trustees during the lifetime of his widow, with the proviso that one-half of it should be paid to his infant child if he lived to the age of thirty years, the other half remaining in the trustees for the benefit of the widow during the remainder of her life. She was to enjoy the whole income during the infancy of the child; after he arrived at the age of twenty-one years he was to receive one-fourth of the income; after he arrived at the age of twenty-five years, one-half; the balance in each case still going to the widow. The will further provided that upon the death of the testator's wife the trustee should hold the principal remaining in trust for his children.

Held, that, construing the deed of trust and the provisions of the will together, the first trust, limited upon the lives of the testator and his wife, terminated upon her death and is valid and should be upheld, although the other trust, taking effect at her death, is invalid because it unlawfully suspends the power of alienation.

A testator, having created a trust term which must end within the period required by the statute, may provide that the income shall be paid during that time to whatever persons for as many different lives as he chooses, provided the whole trust term must end with the death of the survivor of the two lives.

LAUGHLIN and DOWLING, JJ., dissented, with opinion.

APPEAL by the defendant, Harry Dwight Dillon Ripley, from an interlocutory judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 26th day of June, 1914, upon the report of a referee appointed to hear and determine the issues.

Richard Cummins, guardian *ad litem*, for the appellant.

Samuel B. Clarke (Roger H. Clarke with him on the brief), for the respondents.

SCOTT, J. — The sole question of law presented by this appeal is as to the validity in whole or part of the attempted disposition in the will of Harry Dillon Ripley of the fund which he had assigned in trust to the Knickerbocker Trust Company and Sidney Dillon Ripley, as trustees, and which is now held by the Guaranty Trust Company, as trustee. The facts have been so fully and clearly stated by Mr. Justice LAUGHLIN that it will be unnecessary to recapitulate them, and we can accordingly proceed at once to the consideration of the will in controversy. We pass, without deciding, the question whether or not the decree in the Surrogate's Court referred to by Mr. Justice LAUGHLIN is *res adjudicata* so far as concerns the question here, since we are not agreed on that point, and proceed to consider the validity of the will *de novo*.

The objection urged against the will is that, so far as it relates to the fund involved in this proceeding, it undertakes to suspend the absolute ownership of the personal property, of which the trust fund consists, for more than two lives in being at the date of the instrument containing the limitation in violation of what is commonly known as the statute against perpetuities. (See Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 11.)

It is perfectly well settled that, with regard to personal prop-

erty as well as with regard to real estate, the validity of the provisions of a will executing a power of appointment contained in an earlier instrument must be tested by reading the provisions of the will into the instrument which created the power. (*Fargo v. Squiers*, 154 N. Y. 250, 259.) So, reading the deed of trust and the will conjointly, it is apparent that one of the lives mentioned in the statute was that of Harry Dillon Ripley himself, the creator of the trust. This left it open to him to suspend, by his will, the absolute ownership of the fund for not more than one life in being at the time the deed of trust was executed. This one life, as the will was drawn, was that of his wife, Alice Louisa Ripley, for whose benefit the fund in controversy with other property was given to the executors as trustees. It is conceded that this provision for the testator's widow, if standing alone, would be unimpeachable and would not contravene the statute against perpetuities. The argument against the entire invalidity of the ninth clause of the will rests upon the invalidity of other provisions contained in that clause, which, as it is considered by the appellant, constitute so important a part of the testator's scheme of disposition that their invalidity necessarily condemns the whole clause, including the trust attempted to be created for the benefit of the widow. The fundamental question, therefore, which we are called upon to decide is as to whether the valid trust for the life of the widow is so distinct and separable from the other and concededly invalid provisions of the will that it can be upheld.

The rule to be followed in such a case is thus declared in *Kalish v. Kalish* (166 N. Y. 368): "This necessity [of deciding whether as to certain wills the void provisions may be excised] has led to the rule which is now firmly established in this State, that when the several parts of a will are so intermingled or interdependent that the bad cannot be separated from the good, the will must fail altogether; but when it is

possible to cut out the invalid provisions, so as to leave intact the parts that are valid, and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total, as the case may be." (See, also, *Davis v. MacMahon*, 161 App. Div. 458, 464, and cases cited.)

When the testator made his will he had one child, the appellant here, then an infant of tender years, and, as the event proved, his only surviving child. The general scheme of the residuary (9th) clause of the will was that the property should be held by the executors as trustees during the lifetime of the widow, with the proviso that one-half of it should be paid over to the child if he lived to the age of thirty years, the other half remaining in the trustees for the benefit of the widow during the remainder of her life. The widow was to enjoy the whole income during the infancy of the appellant; after he arrived at the age of twenty-one years, he was to receive one-quarter of the income; after he arrived at the age of twenty-five years, one-half; the balance in each case still going to the widow; and finally, when the appellant arrived at the age of thirty years, he was to receive one-half of the fund in possession and control.

We think it quite clear that this created but a single trust term, limited upon the life of the widow, subject to terminate as to one-half of the fund when the child arrived at the age of thirty years, and terminating as to the whole fund on the death of the widow. That this is the true construction of the will is indicated, as we think, by the eleventh subdivision of the ninth clause, wherein the testator attempts to dispose of the remainder after the death of his widow. That subdivision reads as follows: "(11) Upon the death of my said Wife then to hold the remaining moiety of my said estate upon trust for all or any [of] my children or child who being sons attain the age of twenty-one years or being a daughter or daughters attain that

age or marry if more than one in equal shares but subject to the trusts and powers hereinafter declared concerning the same.”

This provision is clearly invalid, but it serves to illuminate and emphasize the intention of the testator that the first gift to his trustees was to last for the lifetime of his widow and be limited thereby.

There are in effect two separate and successive gifts to the trustees. The first expires on the death of the widow. The second was intended to go into effect at her death. If this be the proper construction of the will, it is of no consequence that the whole income is not to be paid to the wife during the full term of the trust. The validity of the will depends upon the limitations of the trust estate, and not upon the manner in which the income is disposed of. “A testator may suspend the absolute power of alienation for a period of two selected lives in being at the creation of the estate, and during that time he may make such disposition of the annual income among as many persons as he sees fit. Thus having created a trust term which must end within the period required by the statute, he may provide that the income shall be paid during that time to A for life, remainder to B for life, remainder to C for life, and so on for as many different lives as he chooses, provided the whole trust term must end with the death of the survivor of the two lives.” (Schermerhorn v. Cotting, 131 N. Y. 48, 58.)

The above quotation exactly fits the case at bar. Here the testator has created a trust term limited upon the life of his wife, and which must end at her death, because upon the happening of that contingency a new trust estate was provided for in the eleventh subdivision of the ninth clause of the will. Within the term of the first trust, differing dispositions are made of the income, depending upon the age of the son. The circumstance that when the son reaches thirty years of age a portion of the fund is to be withdrawn from the trust and paid over to him does not affect the validity of the trust. All that is

invalid in the ninth clause is the eleventh subdivision, undertaking to create a new trust in the remainder after the death of the wife. The only effect of deleting this provision will be that the remainder will be undisposed of and pass as if no such provision had been attempted to be made. It is true that the absolute vesting of the estate in the son may be accelerated if the widow should die before he attains the age of thirty years, and to this extent the intention of the testator may be defeated, but it will be much more decisively defeated if the whole ninth clause be declared invalid and the testator held to have died wholly intestate. In *Kalish v. Kalish* (*supra*) the Court of Appeals, after an exhaustive review of the authorities in this country and England, approved a construction of a will which lifted bodily out of it an invalid trust provision, leaving the antecedent and subsequent provisions standing, although the effect was to accelerate the ultimate vesting of the estate.

We are, therefore, of the opinion that the trust provision for the life of Mrs. Ripley was and is valid and should be upheld, notwithstanding the obvious invalidity of the provision for the disposition of the remainder after her death.

It follows that the judgment appealed from must be affirmed, with costs to plaintiffs and the guardian *ad litem* payable out of the estate.

INGRAHAM, P. J., and McLAUGHLIN, J., concurred; LAUGHLIN and DOWLING, JJ., dissented.

LAUGHLIN, J. (dissenting). — This is a suit in equity by the executrix and executor of Harry Dillon Ripley to compel defendant Guaranty Trust Company to account to them for property held in trust under a deed of trust made by their testator on the 27th day of April, 1899. The testator, after making the deed of trust, and on the 30th day of November the same year, married the defendant Alice Louisa Ripley and the appellant

was born as the issue of the marriage on the 23d day of October, 1908. The testator died on the 8th day of February, 1913, leaving a last will and testament, executed on the 9th day of November, 1909, which was duly admitted to probate in the county of New York on the 5th day of May, 1913. The testator by the deed of trust conveyed certain property to the trustees in trust to pay in their discretion out of the principal or income his debts and taxes and all other charges, including the compensation of the trustees, and to apply the surplus income to his use during his life, and upon his death to convey the corpus as it should then exist, together with any unexpended income, to such person or persons as he should by his last will and testament, or by any instrument in the nature thereof, direct and appoint, and in default of such direction or appointment, "or in so far as such direction or appointment, if made by him, may not extend or be effectual, then to such person or persons as would be entitled to take the same according to the now existing Laws of the State of New York, if he should die possessed of the same an intestate, and the same were all personal property, in such shares or proportions as they would be entitled to take."

The claim of the plaintiffs is that by his will he appointed the remainder of the trust property to them as his executrix and executor and trustees to administer as part of his estate and in trust as therein provided; and they also claim that a decree of the Surrogate's Court made in another proceeding relating to another trust, but to which the appellant and his mother were parties, is *res adjudicata* that such is the construction of the testator's will. The issues were referred to a referee, who made a report containing findings of fact and recommending an interlocutory judgment, which was entered on the confirmation of the report, sustaining the plaintiffs' claim to the fund; and from the interlocutory judgment which requires the trust company to account and pay over the fund to the plaintiffs this appeal was taken.

The appellant, by his answer, as amended on the reference, claims that the attempted execution of the power of appointment was void and ineffectual for any purpose, and that the trustee should account to him for two-thirds and to his mother for one-third of the property. One of the original trustees died and the other resigned. The Morton Trust Company was thereupon duly appointed trustee by the testator, pursuant to a reservation in the deed of trust, and it was merged into the defendant trust company on the 3d day of January, 1910.

The decree of the Surrogate's Court, which the plaintiffs claim and the referee found, was *res adjudicata* with respect to the construction of the testator's will, was made on an application by the Bankers Trust Company, as substituted trustee under the will of Sidney Dillon, the testator's grandfather, who died on the 10th day of June, 1892, and whose will was duly admitted to probate in the county of New York on the seventh day of July of that year. By that will the testator was given the life use of a particular share of the estate of his grandfather, and the corpus of that trust fund was given to the issue, if any, of the testator him surviving, unless otherwise appointed by his last will and testament. After the death of Sidney Dillon the Bankers Trust Company, applied to the Surrogate's Court for the judicial settlement of its accounts with respect, among other things, to the fund, the life use of which was given to the testator, and for its discharge. All parties in interest were duly cited, and the decree was made on the 21st day of November, 1913. On that accounting the same points with respect to the validity of the exercise of the power of appointment as are now made by the appellant were presented by the trustee; but the guardian of the appellant joined in the claim of the plaintiffs, which was then the same as now, and recommended that the exercise of the power of appointment be sustained, and that the property be awarded to these plaintiffs. The trustee under the testator's deed of trust was not a party to that proceeding; and

neither the validity nor the effect of the power of appointment with respect to the trust created by the testator was before the court for adjudication. The attention of the court, however, was drawn by counsel for the Bankers Trust Company to the fact that the provision of the testator's will appointing the corpus of the trust fund of which he was given a life use by the will of his grandfather was identically the same as that by which he attempted to appoint the remainder of the trust created by himself, and that necessarily the true construction must be the same with respect to both. That is not, however, necessarily so, for with respect to the trust before the Surrogate's Court it was provided that the corpus should go to the issue of the testator unless otherwise appointed by his will, while with respect to this trust the deed of trust provides that it shall go according to our Statute of Distribution of personal property. This action was then pending, and the attention of the surrogate was also drawn to that fact, and it was argued before him that the issue with respect to the construction of the will of the testator was the same in this action as in the proceeding then before the surrogate. By that decree the Surrogate's Court found that the power of disposition given to the testator by the will of his grandfather over the trust property in the hands of the Bankers Trust Company was lawfully exercised by the creation of the trust set forth in the ninth article of his will "for the benefit of his wife, said Alice Louisa Ripley, she having been a person in being at the time of the death of Sidney Dillon, and that said trust is valid;" and that it was unnecessary for the court in that proceeding "to determine the validity of any of the other dispositions of the trust property aforesaid claimed to have been made by said Harry Dillon Ripley in and by his said will;" and that the plaintiffs herein in their capacity as executrix and executor of the will of Harry Dillon Ripley "are entitled to all the trust property in the hands of the Bankers Trust Company as substituted trustee of the trust

created by the will of Sidney Dillon for the benefit of Harry Dillon Ripley during his lifetime, for the purpose of administering the same as part of the estate of Harry Dillon Ripley under his will, subject to such rights as any persons may have acquired by virtue of the exercise of the power given to Harry Dillon Ripley," with the exception of such part thereof as it might be necessary to reserve in the hands of the Bankers Trust Company, subject to the further order of the court, for the purposes of paying its commissions and costs and allowances, and for the purpose of indemnifying it with respect to taxes which might thereafter be decided to be due to the State. The amount of that trust fund, with which the trustee was charged as having in its hands at that time was \$490,151.45, and of that amount consolidated bonds of the city of New York of the par value of \$133,000 were left with the trustee subject to the further order of the Surrogate's Court for the purposes stated. The referee found, and the interlocutory judgment now under review decrees, that the decree of the Surrogate's Court is conclusive in this action upon the appellant and upon his mother individually and as executrix, and upon the executor, and "that by the will of Harry Dillon Ripley the property over which he had power of disposal or appointment by will under the deed of trust dated April 27, 1899, made by Harry Dillon Ripley to the Knickerbocker Trust Company and another, became subject to administration by his executors as a part of his estate under his will;" and was further conclusive that no part of the property over which the testator had power of disposal or appointment by will under the deed of trust "was subjected to the trust for the benefit of his wife set forth in the Ninth Article of his will or to any of the other trusts set forth in the Ninth and succeeding articles of his will, excepting only such part as might be left in the residue of Harry Dillon Ripley's estate remaining at the conclusion of the administration of his goods, chattels and credits." The interlocutory judgment

further provides, without expressly basing it upon the conclusiveness of the decree of the Surrogate's Court, that with respect to the property involved in this action "the trust of the rest, residue and remainder of Harry Dillon Ripley's estate for the benefit of his wife, set forth in the Ninth article of his will, is valid," and that it is unnecessary for the "Court in this action to determine the validity of any of the other trusts of the rest, residue and remainder of said Ripley's estate set forth in the Ninth and succeeding articles of his will." These are the only provisions of the interlocutory judgment brought in question on this appeal.

We are of opinion that the decree of the Surrogate's Court construing the will of the testator with respect to his exercise of the power of appointment given by the will of his grandfather is not *res adjudicata* with respect to the construction of the provisions of the will of the testator by which he attempted to appoint the trust fund now in question in precisely the same manner and by the same clause of his will as he appointed the fund left in trust by his grandfather. That decree should be regarded in the Surrogate's Court as *stare decisis* with respect to the construction of the will of the testator; but it could have no other effect on the trust now in question for manifestly the Surrogate's Court had no authority to adjudicate in that proceeding with respect to this trust fund, and, as already indicated, the true construction is not necessarily the same in each case, for here the wife would take one-third if the power of appointment has not been effectually exercised, while in the other instance she would in such event take nothing. It becomes necessary, therefore, to construe the will of the testator in so far as he thereby attempted to exercise the power of appointment reserved to himself by the trust deed, and in so doing we express no opinion with respect to the effect of section 34 of the Personal Property Law (Consol. Laws, chap. 41; Laws of 1909, chap. 45) upon the deed of trust, for no creditor or repre-

sentative of a creditor of the settlor of the trust is here attempting to impeach it in whole or in part. The claims of both the plaintiffs and the appellant are made upon the assumption that the deed of trust was valid in its entirety; and we do not, by failing to express an opinion thereon, intend to question the validity of the deed of trust.

At the time the will was made the testator had personal property, aside from the property involved in the trust fund created by him and in the trust created by his grandfather in part for his benefit, in the United States of the value of about \$45,000, and personal and real property in England of the value of £6,610, 3s, 6d, and his personal property in England at the time of his death was of about the same value; and he was fully aware that he owned property of that value, for that valuation, as found by the referee, was placed upon it by himself. It was found by the referee that at the time the will was made the testator was "to some extent in debt," and "was seeking to increase such indebtedness by borrowing money within the United States." Pursuant to an advertisement of the executrix and executor, therefore, claims aggregating \$39,573.40 were presented against the estate of the testator, and the total value of his personal property, excluding from consideration the two trust funds, did not exceed \$27,000 at the time of his death. The referee found that the testator valued the trust fund created by the will of his grandfather, over which he had the power of appointment, at an amount exceeding \$400,000, and that created by his own deed of trust at an amount exceeding \$600,000, and that he spoke of the event of the birth of his son as making him a millionaire, referring to the fact that he had the power of disposition by will of the trust fund under the will of his grandfather in the event of his dying leaving lawful issue.

By the first clause of his will the testator directed the payment of his debts and funeral expenses. By the second clause he bequeathed to his wife the sum of \$100,000. By the third

clause he devised real estate owned by him in England to his wife for life, and upon her death provided that it should become part of his residuary estate. By the fourth clause he bequeathed a leasehold estate in England to his wife. By the fifth clause he bequeathed his jewelry and personal ornaments to his son, and in the event of his death before attaining the age of twenty-one years, to his wife; and devised and bequeathed to his wife his wearing apparel and certain household furniture and effects, including carriages and horses and stable and garage. By the sixth clause he bequeathed certain other furniture and household furnishings and contents to his trustees for the use of his wife, the same to go into his residuary estate after her death. By the seventh clause he made certain comparatively small bequests to servants. By the eighth clause he gave an annuity of \$1,200 to his father, and £1,000 to his wife's sister, and an annuity of \$300 to a servant; and the final sentence of that clause is as follows: "I charge that part of my estate which at the date of my death is in the United States primarily with the payment of the before mentioned legacies and annuities." The first paragraph of the ninth clause is as follows: "All the rest, residue and remainder of my estate both real and personal of whatever nature and wherever situated, including all estate or property over which I may now or hereafter have power of appointment or disposal under the Will of the late Sidney Dillon or under the Deed of Trust dated twenty-seventh April, one thousand eight hundred and ninety-nine, executed by me to the Knickerbocker Trust Company and Sidney Dillon Ripley or otherwise I Give Devise and Bequeath to my executors hereinafter named as Trustees to have and to hold the same for and upon the following trusts, videlicet:

"(1) To hold invest and reinvest the same with full power to sell any property or securities or change the form of any investment and to invest and reinvest the principal or proceeds

in their discretion in properties and securities as hereinafter directed.

"(2) To pay the rents issues profits interest dividends and other income (all which premises are hereinafter referred to as the said income) of the said trust estate to my said Wife Alice Louisa Ripley during her life but subject as regards one moiety of the said income to the provisions hereinafter contained in favor of my children and issue."

The further provisions of the ninth article of the will, so far as material to the question presented for decision, give his child or children, on and after attaining the age of twenty-one years, "*one-fourth part of the said income,*" and on and after attaining the age of twenty-five years another *one-fourth part of the said income* for life, and further provided that on *any* child attaining the age of thirty years he and the issue of any deceased child, *per stirpes*, shall take in equal shares one-half the corpus of the residuary estate; and that on the death of the wife the trustees were to hold the other one-half of the residuary estate in trust to pay the income in equal shares to his sons who attain the age of twenty-one years, and his daughters who may marry or attain that age, and that the share of a child dying before attaining the age of thirty years leaving issue should be held on like trust for such issue if male attaining the age of twenty-one years, and if female attaining that age or marrying. It is therein further provided that if a child of the testator should die without attaining a "*vested interest*" his share should be added to the shares of the others in equal proportions and held on the same trust as the original, and that if his wife should die leaving none of their issue "*who shall live to attain a vested interest in the said premises under the trusts aforesaid,*" his trustees should pay the income to a designated sister of his wife for life, and that after her death his trustees should hold all of his estate and the income thereof in trust for such of his two brothers as should be living "*at the time of*

the failure or determination of the prior trusts" and the children then living "of such of" his two brothers as "shall be then dead in equal shares *per stripes*."

In deciding whether the will violates the statute against perpetuities by suspending the absolute ownership "for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator" (Pers. Prop. Law, § 11), the will must be read into the deed of trust which created the power of appointment. (Fargo v. Squiers, 154 N. Y. 250; Genet v. Hunt, 113 id. 158.) One of the lives to be considered is that of the testator. It is manifest, therefore, that it was not competent for him, by the exercise of the power of appointment by will, to create a trust for a longer period than one life after his death, for it was not competent for him to suspend the power of alienation of the corpus for a longer period than one other life *in being at the date of the deed of trust*. It was, however, competent for him to create a trust for the life of his wife, who was in being at that time, and if he had limited the trust to the period of her life it would have been competent for him to have provided for the division of the income between her and his children during that period; and he could also have provided a *separate and independent* trust for his wife, and if he had done so, it could be sustained even though the other trusts attempted to be created be invalid. (See Davis v. MacMahon, 161 App. Div. 458, and cases cited.) If, however, the trusts cannot be segregated consistently with the entire scheme of the will all must fall if any are void. (Central Trust Co. v. Egleston, 185 N. Y. 23; Knox v. Jones, 47 id. 389.) That, however, he did not intend to do, and to sustain a trust for her with the other trusts attempted to be created, invalid, would defeat the general

scheme of the will. This is not a case where the court should endeavor to sustain the exercise of the power of appointment, on the theory that the primary purpose of the testator was to make provision for his wife, for if the attempted exercise of the power of appointment be ineffectual, he has by the deed of trust made provision for her by providing that she shall take the same share as if the fund were all personal property and he died intestate owning it. She would, therefore, take under the deed of trust a one-third remainder and the appellant two-thirds. It is manifest that the object of the testator was to create a trust for the benefit of his children quite as much as for the benefit of his wife. If the trust should be sustained in favor of the wife, and the other trusts and disposition of the remainder under the exercise of the power of appointment should be deemed void, then the wife would receive more than the testator intended, for she would take one-third of the remainder under the deed of trust, subject to her own life use of it all, or, at least, of the income of all, with the exception of that which he intended to give to his children who should live to attain the ages of twenty-one or twenty-five years. The whole scheme and purpose of the will was to create substitute provisions by the trusts for the benefit of his wife and children in the first instance, and other trusts by which one-half of the remainder would go to the children or to their issue, and the other half would go to others who would take nothing under the deed of trust. The trust for the sister of his wife was plainly for a third life, and was, therefore, void. The power of alienation over the moiety which was not to go to his children or their issue was plainly suspended for more than two lives in being for it was limited on a trust for himself, for his wife for life, and then for his children and their issue, and if it should not then vest other successive trusts were attempted to be created. The trusts attempted to be created for his children and their children were void for the reason that they might not have taken effect

until after the death of their mother, which would have been the expiration of two lives upon which they were limited, viz., the lives of both father and mother.

These views probably render it unnecessary to consider the contention that the personal representatives of the testator take the fund for the purposes of administration, and that the *remainder only* after the payment of debts, legacies and annuities, is subject to the trusts attempted to be created. It appears that the property left by the testator, together with that received by the plaintiffs from the other trusts, is far more than sufficient to pay the debts, legacies and annuities, and, therefore, the plaintiffs do not show or even claim that it is necessary to have the fund paid over to them for those purposes, even if they would be entitled to recover it if necessary for the purposes of administration. Moreover, it is quite plain, I think, that the testator only intended to give this fund to his executor and executrix and trustees *for the purposes of the trusts*. The will is unlike that in *Fargo v. Squires (supra)* wherein by the opening clause the testatrix manifested an intention to dispose of both her own property and that over which she had a power of appointment. Here there is no attempt to dispose of this fund, excepting in the ninth article of the will, which follows the provisions with respect to debts, legacies and annuities; and the case, therefore, falls within the rule stated in *Farmers' Loan & Trust Company v. Kip* (192 N. Y. 266), that the testator's personal estate, not otherwise disposed of or exempted by his will, "constitutes the natural and primary fund for the payment of legacies as well as of debts," which "is controlling unless the will, either in express terms or by necessary implication, discloses a different intention on the part of the testator." It is unnecessary to consider whether this trust fund is covered by the eighth article of the will, by which the testator charges his property in the United States with the payment of the legacies and annuities, for, if so, the attempted exercise of the power of appointment being

void, that would at most merely make the legacies and annuities a charge on this fund to be enforced by appropriate action, but would not entitle the plaintiffs to recover the entire fund for the purposes of general administration, as is sought here.

As already stated, the plaintiffs by their complaint predicate their right to recover on the will and argue in support of the trust for the wife. Their counsel, however, toward the end of his brief, seems to take the inconsistent position that the deed of trust in so far as it purports to dispose of the remainder, either by the exercise of a power of appointment or without, was void, and that the title remained in the testator until his death and then passed to the plaintiffs. I am of opinion that the deed of trust was valid *in toto*. It is not necessary to decide whether the testator could have revoked it, for he made no attempt to do so, and upon his death the appellant and his mother on the failure of the testator effectually to exercise the power of appointment, took a vested remainder in possession. (Genet v. Hunt, *supra*; Crackanthorpe v. Sickles, 156 App. Div. 753; Newton v. Hunt, 134 id. 325. See, also, Whittemore v. Equitable Trust Co., 162 App. Div. 607.)

It follows that the interlocutory judgment should be reversed, with costs to all parties payable out of the fund, and final judgment should be entered requiring the trust company to account to the appellant and to his mother under the deed of trust.

DOWLING, J., concurred.

Judgment affirmed, with costs to plaintiffs and guardian *ad litem* payable out of the estate.

PAUL ORTH and Others, Appellants, v. MAX B. KAESCHE and FRANK H. WASEL, as Executors, etc., of ALFRED ORTH, Deceased, Defendants, Impleaded with GERTRUDE MIETHE and CATHARINA WASEL, Respondents.

(*Supreme Court, App. Div., First Department, December 31, 1914.*)

CONTRACT — WILLS — VALIDITY OF LEGACIES TO WITNESSES — RESCISSION OF CONTRACT TO ALLOW PAYMENT OF INVALID LEGACIES UPON GROUND OF MISTAKE OF FACT — AGREEMENT INDUCED BY MISREPRESENTATION AS TO FOREIGN LAW.

Where the sole witnesses to a will were named as legatees and the will was proved by means of their testimony, thus avoiding the legacies, agreements, executed between non-resident legatees and the executors, but not carried out, consenting to the payment of the void legacies and signed solely in reliance upon a misrepresentation as to the law of this State, made by a representative of the witnesses, may be rescinded upon the ground of a mistake of fact, without imputing fraud or intentional misrepresentation on the part of said representative.

Such agreements not having been carried out were nothing more than orders upon the executors to make payment to persons to whom the legatees owed nothing, and were, therefore, subject to revocation at any time before they had been complied with.

HOTCHKISS and LAUGHLIN, JJ., dissented, with opinion.

APPEAL by the plaintiffs, Paul Orth and others, from a judgment of the Supreme Court in favor of certain of the defendants, entered in the office of the clerk of the county of New York on the 4th day of March, 1914, dismissing the complaint upon the decision of the court after a trial at the New York Special Term.

James F. Donnelly, for the appellants.

Bernhard Bloch, for the respondents.

SCOTT, J. — The purpose of this action is to obtain a judgment canceling and annulling two certain instruments executed

by the plaintiff Paul Orth, and by Carl Orth, the deceased father of the plaintiffs Carl B. Orth and Louisa A. Seufferheld.

The following are the facts: On or about April 9, 1905, one Alfred Orth, a resident of this State, died at Woodhaven, Queens county, leaving a last will and testament, dated on or about August 5, 1904. This will was duly admitted to probate on June 15, 1905, and the defendants Max B. Kaesche and Frank H. Wasel were duly appointed executors. The estate involved amounts to upwards of \$20,000. By his will the testator bequeathed to his two brothers, Carl and Paul Orth of Heilbronn, Germany, a sum of money amounting to about \$14,000 then on deposit with a certain firm. He made several specific bequests, among which was a bequest to the defendant Catharina Wasel of a mortgage on property in Brooklyn, out of which she was to pay the defendant Gertrude Miethe the sum of \$1,500, which sum was bequeathed to said Gertrude. Catharina Wasel and Gertrude Miethe were the sole witnesses to the will. It was by means of their testimony that the will was proved, and without their testimony it could not have been proved. This avoided the legacies to them. (2 R. S. 65, §§ 50, 51; now Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap 18], § 27.)

After the probate of the will the said legatees, or some one acting in their interest, caused to be prepared the two instruments which are the objects of attack in this action. These instruments were identical in form except as to the name of the party of the first part thereto, and a description of the one afterwards executed by plaintiff Paul Orth will serve as a description of both.

This instrument recited that it was made on June 7, 1906, between Paul Orth, of Heilbronn, Germany, party of the first part, and Max Kaesche and Frank Wasel, as executors of the last will and testament of Alfred Orth, late of Woodhaven, etc., parties of the second part. It recited that Alfred Orth

died leaving a last will and testament which had been duly proved and letters testamentary issued to said parties of the second part. It further recited the provisions of the will in favor of Carl and Paul Orth and Catharina Wasel and Gertrude Miethe; that the said beneficiaries, Mrs. C. Wasel and Mrs. Gertrude Miethe, "signed said will as witnesses and by so doing are precluded from receiving the legacies bequeathed to them by the said Alfred Orth, and the parties of the second part [the executors] have been advised by their counsel learned in the law, that payment of said legacies cannot be made by them without consent of the next of kin and heirs at law of the said Alfred Orth." It was further recited that the party of the first part was desirous of carrying out the wishes of said testator as expressed in said last will and testament, and of securing to the said Mrs. C. Wasel and the said Mrs. Gertrude Miethe payment of the legacies to them bequeathed. The instrument then proceeded as follows: "Now, therefore, I, Paul Orth, brother, and one of the next of kin and heirs at law of said Alfred Orth, deceased, do hereby in consideration of the sum of one dollar to me paid by the parties of the second part and for the purpose of rendering effective the legacies bequeathed by the said Alfred Orth to Mrs. C. Wasel and Mrs. Gertrude Miethe * * * consent to the payment of said legacies by the said executors, the parties of the second part to the said legatees above named, and for the purpose of enabling the said parties of the second part to make such payment I hereby assign, transfer and set over to the said parties of the second part such amount of my share in said estate as will be [the] proportionate part thereof, necessary for the payment of said legacies and I for myself and my heirs, executors and administrators, do hereby release and discharge the said executors, the parties of the second part from all liability they or either of them, their successors or assigns may sustain by reason of the

payment of the said legacies as directed by the provisions of said last will and testament of said Alfred Orth."

These two documents were sent to Gerhard Luyties, who resided at Stuttgart, Germany, with a view to obtaining their execution by Paul and Carl Orth. Luyties procured such execution under circumstances hereafter referred to, and returned the documents to one Julius H. Wasel, a son of Catharina Wasel, who, in turn, delivered them to the executors. The said executors have never acted upon said documents by paying the sums therein specified to Catharina Wasel and Gertrude Miethe, but in January, 1910, in the course of an accounting proceeding before the surrogate of Queens county filed said documents in the Surrogate's Court. The decree originally entered in said accounting proceeding provided for payment to Catharina Wasel and Gertrude Miethe, but before such payment had been made, upon application of these plaintiffs, said decree was amended by striking out the provision for payment to said Wasel and Miethe, and inserting a provision that the sum of \$4,250 should be paid into the Queens County Trust Company "to await the final determination of an action to be begun in the New York Supreme Court within thirty days after the entry of this order by Paul Orth and the legal representatives of Carl Orth against Gertrude Miethe and Catharina Wasel and others to determine the validity of the assignments and to set aside the assignments from Carl Orth and Paul Orth to Max B. Kaesche and Frank H. Wasel, as executors under the last will and testament of Alfred Orth, deceased, on the ground that they are without consideration; and on the further ground that Gertrude Miethe and Catharina Wasel are not privy to them and cannot take advantage of any provisions therein, and on the ground that the said assignments are not for the benefit of the said Catharina Wasel and Gertrude Miethe, and are not binding upon the legal representatives of Carl Orth, deceased; and on the further ground that the said assignments are invalid for

fraud; and on such other grounds as may properly be advanced against the sufficiency of the said assignments."

It was further provided in said amended decree "that the striking out of the provisions for the payment of the money herein to Gertrude Miethe and Catharina Wasel be without prejudice to their rights in the action to be begun in the Supreme Court, as well as without prejudice to the rights of Paul Orth and the legal representatives of Carl Orth in such action; it being the intention of this court to leave the entire matter with reference to the rights of said parties under said assignments to be determined in the Supreme Court as if the matter had not arisen in the Surrogate's Court."

Thereupon the present action was begun. The executors of Alfred Orth, deceased, take no part in the controversy and make no claim under the disputed documents. The circumstances attending the execution of the documents are detailed in the depositions of Paul Orth and Gerhard Luyties, who do not disagree in any important particular.

Paul Orth, who, in June, 1913, was sixty-five years of age, was a retired magistrate. He was able to speak and write the English language, how fluently or accurately does not appear. Carl Orth, the brother, could neither speak nor read English. Gerhard Luyties, whose deposition was read in behalf of the defendants, after stating that a friendship had existed between himself and Catharina Wasel and her son, and that they had asked him to procure the execution of the documents by Paul and Carl Orth, testified in substance, that it was his belief and opinion that the will was rendered invalid by reason of the fact that Catharina Wasel, one of the witnesses thereto, was a relative of the testator, and that he so stated to the two Orths; that he explained to said Orths that according to American law it was not permitted that a relative sign a testament as witness; probably also for this reason the testament of Alfred Orth was invalid, and that, therefore,

their consent was necessary to carry out the testament; that he told Paul and Carl Orth that the testament of the deceased Alfred Orth would be invalid in case they did not sign the papers Exhibit A and Exhibit B (the documents in dispute); that he told Paul Orth and Carl Orth that the testament of the deceased Alfred Orth could not be admitted to probate if papers Exhibit A and Exhibit B were not signed by them.

Without quoting further it suffices to say that it is entirely apparent from the testimony of this witness, as well as that of Paul Orth, that the brothers Orth were induced to sign the instruments solely because they were told by Luyties and believed that under our law the will would be wholly invalid and the property distributed as in case of intestacy, if they did not execute the documents then presented for their signature. This, of course, was erroneous, and their mistake being with respect to the law of a foreign country, was a mistake of fact. (*Curtis v. Leavitt*, 15 N. Y. 9, 193; *Vinal v. Continental Const. Co.*, 53 Hun, 247.)

We have, therefore, the case of an agreement not yet acted upon, which was executed under a material mistake of fact induced by the erroneous statement as to that fact by the agent of the party to be benefited by the instrument. This is ample ground for a rescission, and it matters not whether Luyties intentionally or innocently made the misstatements of fact. If he did so intentionally the transaction is tainted with fraud. If he did so innocently, believing that the law in this country was as he stated it, still the Orths, if they believed his statements and relied upon them, as they clearly did, were and are entitled to a rescission so long as the document remains executory, for it is well settled that a court of equity may rescind an apparent contract for the mistake of one party only, without finding fraud or inequitable conduct in the other. (*Harper, Inc., v. City of Newburgh*, 159 App. Div. 695; *Silverman v. Minsky*, 109 id. 1; *Goodman v. Laborn*, 11 id. 617; *Crowe v.*

Lewin, 95 N. Y. 423.) The true rule is thus stated in Kerr on Fraud and Mistake (4th Eng. ed. p. 3): "It is important to bear in mind that an action of deceit differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone, for without proof of fraud no action of deceit is maintainable."

There is, therefore, ample ground for rescinding the agreements without imputing to Gerhard Luyties fraud or intentional misrepresentation.

There is still another reason why the plaintiffs are entitled to a judgment of rescission. The defendants Catharina Wasel and Gertrude Miethe were not parties to the instruments which are under seal; there is no assignment of anything to them, and no consideration flowed from them, not even a moral consideration based upon their sacrifice of their legacies by reason of their testifying to establish the will, for under the statute they could have been compelled to testify. All that we have, therefore, is a voluntary order upon the executors to pay certain sums of money to the legatees, Wasel and Miethe, with an assignment to the executors of a sufficient amount out of the shares of the two others to make the payment. This assignment, of course, carried nothing to the executors unless they make the payment, and they claim nothing under it.

If they had made the payments before the attempted revocation of the documents they would doubtless have been protected. But, until the executors acted by making payments thereunder, it remained open to the Orths, for any reason they

chose, to revoke their authorization. Clearly there was no gift to the legatees Wasel and Miethe, for nothing was ever delivered to them and no agreement ever made with them. Although couched in formal phrase and embellished with seals, the documents were nothing more than orders upon the executors to make payment of the plaintiffs' money to persons to whom the plaintiffs owed nothing. Such an order was subject to revocation at any time before it had been complied with. Upon both grounds above stated the plaintiffs were entitled to recover and the judgment against them was erroneous.

The judgment appealed from must, therefore, be reversed and judgment directed in favor of the plaintiffs, with costs in this court and the court below. A decision embracing such additional findings as are deemed necessary and a form of judgment may be presented for settlement upon notice.

MCLAUGHLIN and CLARKE, JJ., concurred; LAUGHLIN and HOTCHKISS, JJ., dissented.

HOTCHKISS, J. (dissenting). — I am unable to concur in the reversal of this judgment, which, I think, is in accord with the evidence and the law. The test of our jurisdiction is not what we would have done had we been sitting in the place of the trial court, but whether the judgment appealed from is supported by the facts and is in conformity to law. Whether the instruments may be avoided on the ground either of unilateral mistake or fraud, depends upon (1) whether the Orths in fact relied on what Luyties said; and (2) whether in law they had the right to rely on it. The court below found that when the two Orths executed the instruments in question, they were fully aware of their contents, and the learned trial court refused to find that in attaching their signatures to such instruments the Orths relied on anything that was said to them by Luyties. This is equivalent to an affirmative finding that the Orths did not rely on what

Luyties told them. To succeed on this appeal, it is necessary for the appellants to show that this finding is either without evidence to support it, is against the weight of evidence, or that the instruments are in and of themselves ineffectual to invest the respondents with title to the interests in dispute.

First, as to the finding of fact. That the two Orths knew the contents of the papers they severally signed can scarcely be disputed. Paul, the survivor, testified that he and the deceased Carl, in response to a letter from Luyties, went from their home in Heilbronn to Stuttgart and called upon Luyties at his residence, where the conference with reference to the instruments took place between the three men, and that as the result of this conference the three proceeded to the office of the United States vice consul where the papers were severally executed by the Orths and as so executed were delivered to Luyties. From the testimony of both Paul and Luyties it is to be inferred that these two and Carl were together from the beginning of the conference until the papers were executed. Paul also testified that the two papers were read aloud (presumably in the hearing of both of the Orths) "either * * * in English or * * * in German translation." Paul spoke and wrote English, but Carl understood German only. Of himself, Paul admitted: "I had obtained perfect knowledge of its [the paper's] entire contents." That Carl's knowledge was of equal degree can scarcely be doubted as it is not at all probable, assuming the paper was not fully translated to him, that his brother Paul, the interest of the two being identical, did not afford him (Carl) the benefit of his (Paul's) superior intelligence. In the case of the ordinary adult plaintiff, this state of facts might safely be taken as evidence that the parties not only knew the words composing the text, but as well, that they comprehended the import thereof. I see nothing to overcome a similar presumption in this case. On the contrary, as I view them, the facts strengthen it. Both Orths were men of mature years

and are shown to have been of superior education. Paul was a retired magistrate and appears to have had a knowledge of law sufficient to enable him to discriminate between certain of Luyties' statements as to the legal status of the will, and others which to Paul seemed improbable, because Paul says that although he believed Luyties' statement that because two relatives of the testator had signed the will as witnesses the will was thereby wholly voided, he placed no credence in Luyties' further statement that the will being invalid, the testator's property would escheat to the State, for, as he says, "I believed the legal right of succession would set in."

Read in the light of this situation, the instruments sought to be avoided contain in themselves persuasive evidence that the two Orths fully comprehended their true import and quite sufficient proof to justify the trial court in refusing to find that either of the Orths relied on Luyties' statement of the legal effect upon the will resulting from the fact that it was witnessed as above set forth. The two instruments are in identical form except as to parties and signatures. They recite the death of Alfred the testator, "leaving a last Will and Testament * * * which said Will has been duly proved by the Surrogate of said Queens County and letters testamentary have been duly issued * * * and are now in full force and virtue;" that "the said beneficiaries Mrs. C. Wasel and Mrs. Gertrude Miethe signed said Will as witnesses and by so doing are precluded from receiving the legacies bequeathed to them by the said Alfred," and that the executors have been advised by counsel that they may not pay said legacies "without consent of the next of kin and heirs at law of the said Alfred;" that "the party of the first part [Orth] is desirous of carrying out the wishes of the said testator as expressed in said last Will and Testament and of securing to the said Mrs. C. Wasel and the said Mrs. Gertrude Miethe payment of the legacies to them bequeathed. Now, therefore, I, * * * for the purpose of rendering effective

the legacies bequeathed by the said Alfred * * * do hereby consent to the payment of said legacies * * * and for the further purpose of enabling the said parties of the second part [executors] to make such payment I hereby assign * * * to the said [executors] such amount of my share in said estate as will be proportionate part (*sic*) thereof necessary for the payment of said legacies." Could language be clearer? On the face of these formal papers the parties are notified that the will has been "duly proved;" that letters testamentary "are now in full force;" that because of having witnessed the will, what? Is the will itself void? No, merely that the two legatees are precluded from receiving "their legacies;" nevertheless it is the "purpose" of the Orths to render them "effective." Who was Luyties, that this retired magistrate and his brother should accept his opinion on a question of American law? He describes himself as a "merchant." Presumably he had no knowledge of the law of this State, and his erroneous views concerning it strengthen this presumption of ignorance. Moreover, his conference with the Orths occurred on June 7, 1906, some seven years before the deposition of Paul was taken, a period quite sufficient to have enfeebled the latter's recollection, and what is more to the point, to have stimulated his acquisitiveness and so to have easily led up to a state of mind on his part where he was ready to affirm with confidence his reliance on Luyties. I find in the deposition of Paul further evidence to justify a refusal to accept his statement as to the extent to which he relied on what Luyties told him of the law. He says, "I never thought of the possibility that by signing this [the instrument] I could obligate myself towards Gertrude Miethe and Catharina Wasel to pay to them the entire or any part of the legacies which they were to receive. * * * I never conceived of the possibility that these legacies were to be taken from *my* and *Carl* Orth's share of the estate, * * * but conceived * * * that these legacies would be paid

from the entire estate by the Executor in advance; I never thought that Carl Orth and I would obligate ourselves by these signatures to carry out the two legacies named in any way at our expense."

May not the foregoing afford the key to the present action? Is it not probable that when the two Orths, or Paul, the survivor, on reflection recalled that the legacies were to be paid from the Orths' portion of the estate alone, disappointment over the diminished returns led to his giving an exaggerated importance to the witless statement of Luyties concerning the law. On the whole, must we accept Paul's present testimony as to the effect on his mind seven years before of what Luyties told him, as sufficient to overturn a finding based upon so many circumstances contradicting it? *Second.* On this record I am prepared to go further than did the trial court, and to find not only that the Orths did not rely on what Luyties told them but also to hold as matter of law, and notwithstanding the rule of ratification or adoption, they had no right to rely on it. By this latter rule, one who knowingly appropriates or enjoys the fruits of another's act will not afterwards, ordinarily, be heard to say that the act was unauthorized. But does this rule apply in a case of representations repugnant to the express terms of an instrument sought to be avoided, and where he who invokes the rule has notice of a lack of authority to make the representations relied upon. Of this rule Mr. Mechem, in his work on Agency (2d ed., § 435), says: "Like all other general rules, however, this is one which must be received with caution, and applied with discrimination; for it is perfectly clear that there are many cases in which one may receive a benefit without incurring any obligation either to return or to pay for it." In *Quinlan v. Providence Washington Ins. Co.* (133 N. Y. 456), Judge ANDREWS said: "No principle is better settled in the law, nor is there any founded on more obvious justice than that if a person dealing with an agent knows that he is acting

under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or special one." I concede that these words were used in a case involving the question of an agent's authority and not a question of ratification or adoption, but their logic is, I think, equally applicable to a situation where the latter only is involved, in circumstances similar to the present. So far as this record discloses, Luyties was but a messenger to whom the papers were sent to be presented to the Orths for signature. As a merchant, and particularly as a foreign merchant, the Orths had no reason to believe that Luyties knew or had been asked to convey any information about the law of this State or that anything he might say on that subject came from the lips of other than an ignorant and uninstructed volunteer. Suppose that by the hands of an ignorant messenger, A sends to B, an Assyrian scholar, a communication couched in cuneiform characters, would any one say, not merely that he in fact did, but as well that in law B had a right to rely on any interpretation of the characters the messenger might be pleased to give, and no matter how contradictory such interpretation might be to the plain statement of the characters themselves? Analyzed in the light of legal principles, we would find (1) the messenger would be presumed to have acted not for A, but solely on his own account; as to B, his acts would be *inter alios acta*; (2) B would be presumed to have dealt with the messenger in his individual capacity and not as representing A. (Story Agency [7th ed.], § 251a.) The situation is quite different from one where a contract which is sought to be enforced was itself negotiated or procured by him whose acts are repudiated. In such case the rule of ratification or adoption applies. Here, as I show hereafter, we have a case of consummated gift; and one which the donors seek to avoid because of the acts of one

whom I regard as a stranger, a mere volunteer, having as to the phase of the matter now under discussion no legal relation to the donee. True, the transfers from the Orths involved no consideration, but that of itself is not sufficient to entitle the donor to rescind for mistake induced by the act of a stranger. The interests described in the assignments were assignable. (Code Civ. Proc. § 1910; now Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 41; *Chambers v. Lancaster*, 160 N. Y. 342.) On delivery of the executed instruments, title passed to the executors for the use of the two legatees, and thereafter, so far as revocation or annulment are concerned, the title of the donees was as strongly entrenched as if the transaction had been one of sale. (*Picksley v. Starr*, 149 N. Y. 432.)

But the question remains, did the instruments constitute valid gifts? So often have they been stated that it is unnecessary, except for the purpose of recalling them, to restate the essential ingredients of a valid gift *inter vivos* of personal property. They are (1) a clear intention on the donor's part to make the gift *in praesenti* with some evidence of acceptance by the donee, and (2) complete and unconditional delivery. Delivery may be in accordance with the nature of the thing given (*Gannon v. McGuire*, 160 N. Y. 476, 481), and hence actual or constructive (*Beaver v. Beaver*, 117 id. 421), and may be to a third person as agent or trustee for the use of the donee. (*Bump v. Pratt*, 84 Hun, 201; *Taylor v. Kelly*, 5 id. 115.) If evidenced by a written instrument, the instrument must be delivered (*Williams v. Guile*, 117 N. Y. 343), the essential thing being that the donor is divested of his title to and dominion, as owner, over the gift. (*Beaver v. Beaver*, *supra*, 428, 429.) And a transfer may be sustained as a gift, although the form of a sale is adopted merely to give effect to the donor's intentions. (*Van Deusen v. Rowley*, 8 N. Y. 358.) Here the instruments express a consideration, but the intent to

give is apparent from the entire situation as disclosed and is expressly manifested by the words "desirous of carrying out the wishes of the said testator," "for the purpose of rendering effective the legacies;" and "for the purpose of enabling" the executors "to make such payment." On delivery of the instruments title to and dominion over the interests, which were the subject of the gifts, passed from the donors to the executors by the words, "I hereby assign, transfer and set over" to them "such amount of my share in said estate as will be * * * necessary for the payment of said legacies." The instruments expressed all of the essential elements of a transfer in trust for the benefit of the legatees. (*Brown v. Spohr*, 180 N. Y. 201.) The executors were not in the position of one to whom possession alone of the subject of the gift is given with directions to deliver to the donee, for they took the legal title of which the donors were completely divested. Although, because of the nature and situation of the interests transferred, the donees might not have been able to immediately enter upon their enjoyment, the transfer thereof, for their benefit, was immediate. That the two instruments were delivered with intent that they should be at once effective can scarcely be disputed, and that such delivery was irrevocable seems to me is a necessary corollary from the facts.

For the reasons given the judgment should be affirmed.

LAUGHLIN, J., concurred.

Judgment reversed and judgment directed in favor of plaintiffs, with costs in this court and in the court below. Order to be settled on notice.

JOHN H. RILEY, as Executor, etc., of DAVID LAWTON,
Deceased, Respondent, v. JAMES MCGEE, Appellant.

(Supreme Court, App. Div., First Department, January 22, 1915.)

**EXECUTORS AND ADMINISTRATORS — EXAMINATION OF SURVIVING PARTNER
TO FRAME COMPLAINT — ACTION TO RECOVER ASSETS — PRIOR RELEASE
BY TESTATOR.**

Where the will of a deceased partner bequeathed his share in the firm assets to the plaintiff's testator and the latter conveyed the interest in the partnership to the surviving partner, executed a settlement agreement and released the surviving partner from accounting to the estate of the deceased partner, the executor of the legatee, after his death, is not entitled to examine the surviving partner in order to frame a complaint in an action brought by him as executor to recover assets without first having the conveyance set aside in an appropriate action. This, because the personal property of the deceased partner did not vest in his legatee's executor, but in his own personal representatives for the purpose of administration.

APPEAL by the defendant, James McGee, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of December, 1914, denying his motion to vacate an order for his examination obtained to enable the plaintiff to frame his complaint.

Philip S. Dean, for the appellant.

Thomas O'Rourke Gallagher, for the respondent.

LAUGHLIN, J. — The plaintiff as executor of David Lawton, deceased, claims that he has a cause of action against the defendant to recover assets of the estate, but that he requires an examination of the defendant to ascertain "the exact total" of the personal property of which Morris Lawton, the son of

the testator, died seized, and "the increase of same" and the income of the "properties" of plaintiff's testator to enable him to frame a complaint; and he shows by affidavit that he wishes to ascertain by the examination what assets were owned by a copartnership between the defendant and said Morris Lawton, which he alleges existed down to the death of the latter, and what bank accounts the firm or its members had either jointly or severally, and the balances shown thereby, and the real estate held by them jointly and severally, and the interest of each therein and the income thereon, and to trace the income from the death of Morris Lawton to the death of plaintiff's testator and "any and all other facts material to the issue."

We are of opinion that the plaintiff failed to show that he was entitled to the examination. He merely showed that the defendant and Morris Lawton, who died on the 24th of October, 1907, leaving his father his sole heir at law and next of kin, were copartners, and as such had accumulated five parcels of real estate, concerning which there was no accounting between them; that after the death of Morris Lawton and on the 11th day of December, 1907, the defendant "by trick and device and fraudulent representations" induced plaintiff's testator and his wife "to sign over" to defendant the five parcels of real estate which the defendant and Morris Lawton held as copartners, "together with two other pieces" and to execute an agreement to the effect that there was nothing due and owing from the defendant to the estate of Morris Lawton; that the deeds of conveyance and agreement which were so executed by the plaintiff's testator "are the basis of another action now pending in the Supreme Court, of this county, brought by the heirs to remove a cloud on title;" that the defendant ever since said conveyance to him has managed and controlled the real estate and has had possession "of all of the personalty," and that the plaintiff has no knowledge with respect to the extent or

value of the same. No partnership between the plaintiff's testator and the defendant is shown or claimed. If on any theory plaintiff has a cause of action against the defendant for an accounting, he would not need or be entitled to an examination to frame a complaint. (Matter of Gardner, 124 App. Div. 654; *Pierce v. McLaughlin Real Estate Co.*, 121 id. 501.) But plaintiff's counsel insists that this is not a suit in equity for any purpose. With respect to the copartnership between defendant and Morris Lawton, the property rights of the parties should be determined in an action for an accounting brought by or against the personal representative of Morris Lawton. In other words, the plaintiff as the executor of the father of Morris Lawton is not vested with any cause of action for an accounting with respect to that copartnership. The assets which the plaintiff seeks to recover, with the exception of the income therefrom, arising subsequent to the conveyance, were conveyed to the defendant by the plaintiff's testator; and it appears that at the same time a settlement agreement was executed, by which the plaintiff's testator, in effect, released the defendant from accounting to the estate of his son. It is manifest that neither the property thus conveyed, nor the income therefrom since the conveyances, can be recovered until the conveyances are set aside in an appropriate action therefor. It is not shown that any of the personal property of the plaintiff's testator was assigned to the defendant; but it appears to be claimed that some of the personal property of Morris Lawton came into the possession of the defendant. That property, however, did not vest in the plaintiff's testator, but in the personal representative of Morris Lawton, deceased, for the purpose of administration, and the plaintiff, therefore, would have no cause of action therefor; and if he could maintain a cause of action therefor, it could not be maintained without setting aside the settlement agreement. It is evident, therefore, that the plaintiff fails to

show that there are any assets of *his* testator in the hands of the defendant which he is entitled to recover in this action.

It follows that the order should be reversed, with ten dollars costs and disbursements, and the motion to vacate the order for the examination granted, with ten dollars costs.

INGRAHAM, P. J., McLAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

In the Matter of the Judicial Settlement of the Account of JOHN MURPHY, as Executor, etc., of JOHN W. TRIM, Deceased.

JESSIE RITCHIE, as General Guardian, etc., of ROBERT THOMAS RITCHIE and JOHN RITCHIE, Infants, and ARTHUR M. MILLIGAN, as Special Guardian of Said Infants, Appellants; HARRIETTE M. T. WEAVER, Respondent.

(*Supreme Court, App. Div., Second Department, January 29, 1915.*)

WILL—CONSTRUCTION—INTENT OF TESTATOR—WHEN RESIDUARY LEGACY AND DEVISE DOES NOT LAPSE UPON DEATH OF LEGATEE.

A testator, who left him surviving no widow, issue, father, mother, brothers, sisters, uncles or aunts, after devising to his cousin, Charles Ritchie, the father of two infants, a house and lot, devised another house and lot to said Charles Ritchie and another cousin. Two following subdivisions of his will provided as follows: "*Sixteenth.* Should any of the gifts and bequests made by me in this my will lapse or fail for any reason, I direct that the gift or bequest so lapsing or failing shall go to form part of my residuary estate and be disposed of under and in accordance with the seventeenth paragraph of this my will. *Seventeenth.* All the rest, residue and remainder of my property and estate, as well real and personal and wheresoever situate which, at the time of my death shall belong to me or be subject to my disposal by will,

I give, devise and bequeath unto Charles Ritchie hereinbefore named, absolutely and in fee to his heirs, executors and administrators and assigns, according to the nature of the property." Charles Ritchie died a few days before the testator, leaving him surviving as his heirs at law and next of kin the two infants. The testator's only next of kin are four first cousins.

Provisions of the will construed, and *held*, that it was the intention of the testator to substitute and give such part of his residuary estate as was real property to the heirs, and such part as was personal property to the executors and administrators of Charles Ritchie, for the benefit of his next of kin, in the event that his legatee did not survive him;

That, therefore, the devise and legacy given by the 17th paragraph of the will did not lapse on the death of Charles Ritchie, but, under its provisions, his heirs take the real property and his next of kin the net personal estate.

APPEAL by Jessie Ritchie, as general guardian, etc., and another, from a decree of the Surrogate's Court of the county of Kings, entered in the office of said Surrogate's Court on the 11th day of November, 1913, and also from an order entered in the office of said Surrogate's Court on the 3d day of April, 1914, denying a motion to vacate part of said decree.

The decree settled the accounts of the executor.

Charles E. Hunter, for the appellants.

Thomas A. S. Beattie, for the respondent Harriette M. T. Weaver.

John Murphy, for the respondent executor.

RICH, J. — John W. Trim died on April 15, 1912, leaving a last will and testament which was duly admitted to probate and letters testamentary issued to John Murphy, the executor named in the will. By the 12th paragraph thereof the testator devised to his cousin, Charles Ritchie, the father of said infants, a house and lot in the borough of Brooklyn, and by the

13th paragraph devised another house and lot in said borough to said Charles Ritchie and another cousin, Thomas Ritchie. The 16th and 17th subdivisions are as follows:

“*Sixteenth.* Should any of the gifts and bequests made by me in this my will lapse or fail for any reason, I direct that the gift or bequest so lapsing or failing shall go to form part of my residuary estate and be disposed of under and in accordance with the seventeenth paragraph of this my will.

“*Seventeenth.* All the rest, residue and remainder of my property and estate, as well real and personal and wheresoever situate which, at the time of my death shall belong to me or be subject to my disposal by will, I give, devise and bequeath unto Charles Ritchie hereinbefore named, absolutely and in fee to his heirs, executors and administrators and assigns, according to the nature of the property.”

Charles Ritchie was a first cousin of the decedent and died intestate on March 16, 1912 (predeceasing the testator by approximately twenty days), leaving him surviving as his heirs at law and next of kin the infants Robert Thomas and John Ritchie. The testator left him surviving no widow, issue, father, mother, brothers, sisters, uncles or aunts. His next of kin are four first cousins who would inherit any personal property of which he died intestate.

The only question presented by this appeal is whether the residuary legacy and devise quoted lapsed upon the death of Charles Ritchie. The learned surrogate held that the words “to his heirs, executors and administrators and assigns,” in the 17th paragraph of the will, were words of limitation and not of substitution, and that by the death of the residuary legatee during the lifetime of the testator the legacy to him had lapsed and the decedent died intestate as to the residue of his estate. The appellants concede that such ruling and decision would be correct if there were nothing in the will showing a different intention on the part of the testator, but

contend that the will, considered as a whole, and especially the language of its 17th subdivision, establishes the intention of the testator to substitute and give such part of his residuary estate as was real property to the heirs and such part as was personal property to the executors and administrators of Charles Ritchie for the benefit of his next of kin in the event that his legatee did not survive him, and in this contention I think they are right. It is the duty of courts to give such construction to the provisions of a will as will effectuate the intent of the testator expressed in and properly deducible from the whole instrument, and in so doing words and phrases may be transposed and provisions or words inserted or left out, if necessary, to aid and carry out the testator's actual intent and purpose. (*Tilden v. Green*, 130 N. Y. 51.) The only paragraph in which the testator uses the words "heirs, executors and administrators and assigns," is the 17th. He had made eleven different devises and bequests, two of such devises being to his cousin, Charles Ritchie, and directed the cancellation of two notes owned by him if not paid prior to his death, authorizing his executor to release and discharge their makers, and then provided that if any bequests or gifts made by him lapsed or failed for any reason, they should form part of his residuary estate and be disposed of in accordance with the 17th paragraph of his will, which gave, devised and bequeathed the same to Charles Ritchie. If he had stopped here, the rule adopted by the learned surrogate would have obtained, but he went further and provided, following a comma: "absolutely and in fee to his heirs, executors and administrators and assigns." Had he stopped here, perhaps the rule contended for might have obtained, but he proceeds: "according to the nature of the property." These last words are without meaning and wholly superfluous if it was the intent of the testator, in the event of the residuary legatee predeceasing him, that the legacy should lapse. It will be noted that the residuary bequest and devise

are given to "Charles Ritchie hereinbefore named." These words are followed by a comma, and then "absolutely and in fee to his heirs," etc. I think it was the intention of the testator that, if his residuary legatee died first, his heirs, executors and administrators should take, the heirs taking the real property and his executor or administrator the personal, for the benefit of his next of kin, which would be, in the language of the testator, "according to the nature of the property;" and that this intention is also indicated by the fact that, having given real property to Charles Ritchie by the 12th and 13th subdivisions of the will, without naming his heirs, executors or administrators or any other successor in the event of his dying first, he provided in the 16th paragraph that if such devise lapsed or failed for any reason, they should go into the residuary estate and be disposed of in accordance with its provisions.

It is my opinion that the devise and legacy given by the 17th paragraph of the will did not lapse on the death of Charles Ritchie, but that under its provisions his heirs take the real property and his next of kin the net personal estate of the deceased.

The decree and order of the Surrogate's Court of Kings county must be reversed, with costs, and appellants' motion granted, with ten dollars costs, and the proceeding remitted to said court for further proceedings.

JENKS, P. J., THOMAS, STAPLETON and PUTNAM, JJ., concurred.

Decree and order of the Surrogate's Court of Kings county reversed, with costs, and appellants' motion granted, with ten dollars costs, and matter remitted to said court for further proceedings.

In the Matter of the Judicial Settlement of the Accounts of
ARTHUR H. NORTON and OLIVER B. KINNEY, as Executors,
etc., of MARY JANE SPENCE, Deceased.

MARTHA SCOTT FERRY and Others, Residuary Legatees, Appel-
lants; TRUSTEES OF METHODIST EPISCOPAL CHURCH and
Others, Respondents.

(Supreme Court, App. Div., Third Department, January 15, 1915.)

**WILL—BEQUEST TO RELIGIOUS AND BENEVOLENT USES UNDER SECTION 12
OF PERSONAL PROPERTY LAW.**

A provision in a will as follows: "I give, devise and bequeath to the Methodist Episcopal Church for missionary or evangelistic purposes the sum of three thousand dollars in memory of my father and mother," and others named, constitutes a "bequest to religious * * * or benevolent uses, within the meaning of section 12 of the Personal Property Law, and is valid.

WOODWARD and HOWARD, JJ., dissented, with opinion.

APPEAL by Martha Scott Ferry and others, residuary legatees, from so much of a decree of the Surrogate's Court of the county of Schuyler, entered in the office of said Surrogate's Court on the 26th day of May, 1913, as directs the executors herein to pay to the trustees of the Methodist Episcopal Church of Cincinnati, Ohio, the sum of \$3,000 and interest.

George G. Reynolds, for the appellants.

Bertrand W. Nye [George M. Velie of counsel], for the Trustees of Methodist Episcopal Church and Methodist Episcopal Church, respondents.

Frank Johnson, for the executors, respondents.

SMITH, P. J. — The executors of the will of Mary Jane Spence, of Watkins, N. Y., deceased, on their final accounting asked the surrogate to construe the paragraph of the said will designated as "Twenty a." This paragraph reads as follows: "I give, devise and bequeath to the Methodist Episcopal Church for missionary or evangelistic purposes the sum of three thousand dollars in memory of my father and mother, Abraham and Martha Voak, my husband Wm. A. Spence and my brother Job Voak, deceased."

The learned surrogate, after hearing evidence to the effect that the deceased had previously been a member of the local Methodist church at Watkins, and that she and her family had left the same after some difficulty with other members of that church, and had affiliated with the local Presbyterian church, decided that the bequest was intended for the Ohio corporation known as "Trustees of the Methodist Episcopal Church," and which appears to have been organized for the purpose of taking property in trust for the uses of the Methodist Episcopal church at large. The residuary legatees under the will of Mary Jane Spence appeal from this part of the decree.

The executors do not here appeal. Only the residuary legatees appeal, and their appeal cannot be sustained unless they have been aggrieved by the decision. If, therefore, the will creates a valid gift which may be enforced, either by the "Trustees of the Methodist Episcopal Church," or by one of their missionary societies, or by the court itself, this judgment must be affirmed. Under subdivision 1 of section 12 of the Personal Property Law (Consol. Laws, chap. 41; Laws of 1909, chap. 45) it is provided: "No gift, grant or bequest to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this State, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the grant. If in the instrument

creating such a gift, grant or bequest there is a trustee named to execute the same, the legal title to the property given, granted or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such property shall vest in the Supreme Court." That this is a bequest to religious and benevolent uses cannot be questioned, and it was the purpose of this statute to protect and validate such bequests. Upon the appeal by the residuary legatees only it is unnecessary for us to determine by what corporation or association this bequest shall be administered. The Methodist missionary societies are content that the money should go to the respondent here, as also is the Methodist church in the village of Watkins. In fact none other than the respondents make claim to these moneys, except these residuary legatees, whose only title rests upon the absolute invalidity of the bequest. The judgment should, therefore, be affirmed.

All concurred, except WOODWARD, J., dissenting in opinion, in which HOWARD, J., concurred.

WOODWARD, J. (dissenting). — The executors of the will of Mary Jane Spence, deceased, of Watkins, N. Y., on their final accounting, asked the surrogate to construe the paragraph of the said will designated as "Twenty a." This paragraph reads as follows: "I give, devise and bequeath to the Methodist Episcopal Church for missionary or evangelistic purposes the sum of three thousand dollars in memory of my father and mother, Abraham and Martha Voak, my husband Wm. A. Spence, and my brother Job Voak, deceased."

The learned surrogate, after hearing evidence to the effect that the deceased had previously been a member of the local Methodist church in Watkins, and that she and her family had left the same after some difficulty with other members of that church, and had affiliated with the local Presbyterian church,

decided that the bequest was intended for the Ohio corporation, known as the "Trustees of the Methodist Episcopal Church," and which appears to have been organized for the purpose of taking property in trust for the uses of the Methodist Episcopal church at large. The residuary legatees under the will of Mary Jane Spence appeal from this part of the decree.

While it is undoubtedly true that a mere error in a name of a legatee, whether individual or corporate, would not be permitted to defeat the purpose of a testatrix if it was shown by competent evidence who was in fact intended, it is carrying this rule a long way to make it fit the facts of this particular case. There is not a line of evidence in the record to show that Mary Jane Spence ever knew that there was a corporation known as the "Trustees of the Methodist Episcopal Church;" much less that she had any intention of making a bequest to a corporation having its principal place of business in the southern part of Ohio, more than 500 miles away from her home, while she was surrounded by local churches of that denomination. If the bequest had been made to John Smith, without further designation, we would hardly expect any one to go into Hamilton county, O., to find John Smith. He would, in the natural course of events, be looked for in the immediate neighborhood of the testatrix, and in the absence of some evidence that Mary Jane Spence knew of this Ohio corporation, and that she intended to make a gift to such corporation by the name of the Methodist Episcopal church, the learned surrogate erred in decreeing such a disposition of the funds in the hands of her executors.

Assuming, however, that there was ground for supposing that the testatrix had this Ohio corporation in mind, and that by a gift to the Methodist Episcopal church she intended to make the bequest to this corporation, there is still the difficulty that this corporation is not shown to have capacity to take the property for the purposes to which the testatrix attempted to

dedicate it. The language of the will is that "I give * * * to the Methodist Episcopal Church for missionary or evangelistic purposes the sum of three thousand dollars," etc. We have here a direct and simple gift made in terms that exclude any idea of a trust; there is not even a direction to invest the principal and expend the income. (*Bird v. Merkle*, 144 N. Y. 544, 549.) It is not to be doubted that such a gift, made to a corporation capable of taking and administering the gift, is lawful; the fact that the testatrix has designated the purpose for which the bequest must be used does not indicate a desire upon her part to create a trust. It was entirely proper for her to apply her bounty to the whole or any one or more of the various purposes for which a corporation was authorized to hold property (*Bird v. Merkle*, *supra*), but a gift to a corporation which did not have authority to take for the purposes to which the gift was limited is void. (*Fosdick v. Town of Hempstead*, 125 N. Y. 581.) In the present case the charter of the Ohio corporation clearly does not authorize it to take and administer a gift for "missionary or evangelistic purposes," whatever these may mean. It is limited by its charter to the taking and holding of property in trust; it has no original or independent powers in respect to such property; it has no defined duties or powers except to hold property in the capacity of a trustee "for the benefit of the Methodist Episcopal Church," clearly referring to the church at large, and it has been held that the existence of the church proper as an organized body is not recognized by the municipal law. (*Baxter v. McDonnell*, 155 N. Y. 83, 94, 95, and authorities there cited.) We are referred to no statute authorizing the incorporation of the church at large (*Baxter v. McDonnell*, *supra*), and clearly this is not the purpose of the Ohio corporation, for, as we have seen, its purposes are limited to performing the duties of a trustee for the Methodist Episcopal church, which, as Judge COOLEY says in *Hardin v. Baptist Church* (51 Mich. 137), "is

not incorporated and has nothing whatever to do with the temporalities." Being the trustee of the Methodist Episcopal church, the Ohio corporation cannot be the Methodist Episcopal church, for while a person or corporation may transform himself into a trustee for another he cannot be a trustee for himself. (*Wetmore v. Parker*, 52 N. Y. 450, 459.) The religious corporation and the church, although one may exist within the pale of the other, are in no respect correlative. The objects and interests of the one are moral and spiritual; the other deals exclusively with things temporal and material. Each as a body is entirely independent and free from any direct control or interference by the other. The church, by the nature of its organization, may be entirely independent of other ecclesiastical organizations; or may be a subordinate part of some general organization or denomination in which there are superior ecclesiastical tribunals, with general and ultimate power of control, more or less complete, in some superior judicature, over the whole membership of the general organization. (*Baxter v. McDonnell*, 155 N. Y. 83, 95, and authority there cited.) This is clearly recognized in the articles of incorporation of the "Trustees of the Methodist Episcopal Church," a mere corporate name for a subordinate religious society, for it is provided that the "said board of trustees, under their corporate name, shall have power to take and hold by donation, gift, grant, devise or otherwise, any property, real, personal, or mixed, in any State in the United States, in behalf of and for the benefit of the Methodist Episcopal Church, and the same to manage, grant, convey, lease or otherwise dispose of, and to execute such trust or trusts as may be confided to said corporation — the whole to be under the supervision of, and amenable to, the General Conference," and that "said board shall also be deemed competent to receive and administer any special benevolent trust in behalf of the Church, not otherwise provided for in the benevolent societies

now existing under the authority or by the sanction of the General Conference."

It is clear that the "Trustees of the Methodist Episcopal Church," an Ohio corporation, has no power or authority to accept of a gift for its own use; it is not authorized to take money to be used for "missionary or evangelistic purposes," and the testatrix has not attempted to give the money in trust "in behalf of and for the benefit of the Methodist Episcopal Church." She says she gives it to the Methodist Episcopal church and if this did not refer to the local Methodist church, we have seen that the Methodist Episcopal church at large has no legal existence. It is not incorporated and has no power to take property for any purpose. If the bequest had been made to the "Trustees of the Methodist Episcopal Church," and had been for some or all of the corporate purposes of such corporation, there could have been no question about its validity (*Matter of Griffin*, 167 N. Y. 71, 78), but it was not given to this corporation by its name, nor has that corporation any power or authority to receive this direct gift, even if properly named, because it is not for any of the corporate purposes of the "Trustees of the Methodist Episcopal Church," as defined in its articles of incorporation. (*Matter of Griffin*, *supra*, 79.)

Nor is this case one coming within the purview of chapter 701 of the Laws of 1893,* where it might be held that this gift should not fail because of the incapacity of the "Trustees of the Methodist Episcopal Church" to take the title, for the reason that the attempted gift has in it none of the elements of a trust, and the statute merely provides for giving effect to uses for religious purposes. If the Methodist Episcopal church had a legal existence, and the gift had been made to the "Trustees of the Methodist Episcopal Church" for the

* Now Pers. Prop. Law (Consol. Laws, chap. 41; Laws of 1909, chap. 45), § 12, as amd.— [REP.]

benefit or use of the Methodist Episcopal church, the trust or use would not be permitted to fail, though the corporation named was without power to act as such trustee. The case would be treated as though no trustee had been named, and the Supreme Court would administer the trust. (*Matter of Griffin, supra.*) But no such condition exists; the testatrix has tried to make a gift to a body which has no power to take either directly or as a beneficiary of a trust. At most it is a gift for a cause without naming any person or body as *cestui que trust* who is to be the recipient of the benefit sought to be given. (*Fralick v. Lyford*, 107 App. Div. 543, 546; *affd.*, without opinion, 187 N. Y. 524.) It does not create a trust, and the statute of 1893 provides only for dealing with attempted trusts. (*Fralick v. Lyford, supra*, 546, and authorities there cited.) The Ohio corporation is without authority to take directly for the reasons above indicated; it is not named as a trustee for any one or for any purpose in the will now under consideration (*Fralick v. Lyford, supra*, 546), and the Methodist Episcopal church being an unincorporated voluntary association or society is incapable of taking a direct bequest to it. (*White v. Howard*, 46 N. Y. 144; *Murray v. Miller*, 178 *id.* 316.)

While the above discussion leads irresistibly to the conclusion that the decree of the learned surrogate is founded in error, and should be reversed, it may be proper to indicate that in the discussion I have not intended to convey the impression that any local Methodist church is entitled to this fund. The intent of the testatrix to make a gift to the Methodist Episcopal church at large is manifest. Moreover the evidence indicates that she would not be likely to attempt to make a gift to the Methodist church of Watkins, from which she had withdrawn long years before on account of a church quarrel, and the language of the gift, limiting it to "missionary or evangelistic purposes" — matters not within the purview of local church congregations as a rule, though often made use of as agencies

in the collection of funds for such purposes — unmistakably evidences the purpose of the testatrix to give to the church, as distinguished from the religious corporation having control of the temporalities of the local church congregation. There is in this State no such thing as an ecclesiastical corporation. (Robertson v. Bullions, 11 N. Y. 243; Petty v. Tooker, 21 id. 267; Gram v. Prussia, etc., German Society, 36 id. 161.) “Corporations formed under the 3d section of the act of 1813,* have no denominational character, nor can such a character be in any manner engrafted upon them. That portion of the members organized into a separate body called the church, may belong to a peculiar denomination, but it has no power to impress its distinctive character upon the corporation.” (Petty v. Tooker, *supra*.) There being no such thing as an ecclesiastical corporation, it follows that a gift to the corporate body known as the Methodist Episcopal Church of Watkins, for instance, would not be a gift to the Methodist Episcopal church in its spiritual or general sense, but would be a gift to the particular congregation which might, at will, change the form of its worship. Indeed it has been held that the trustees of a religious corporation in this State cannot receive a trust limited to the support of a particular faith, or a particular class of doctrines, for the reason that it is inconsistent with those provisions of the statutes which give to the majority of the corporation, without regard to their religious tenets, the entire control over the revenues of the corporation. (Gram v. Prussia, etc., German Society, 36 N. Y. 161, 165.) A gift to the Methodist Episcopal church generally could not be carried out in the spirit of the testatrix's purpose by turning it over to a lay corporation thus organized and constituted, even though its corporate name should correspond with that used in the will. If she had intended to give to the Methodist Episcopal church of

* See R. L. of 1813, chap. 60, § 3.—[RKP.]

Watkins it was very easy to indicate the intent, and the fact that she did not mention Watkins in connection with the designation, with the evidence in this case, makes it very certain that she did not intend to do anything for the local congregation with which she had quarreled back in 1867, and which had induced her to affiliate with the Presbyterian church in Watkins during the remainder of her lifetime.

The intent of the testatrix should, of course, govern in so far as that intent is in harmony with the law, and she should not be compelled to contribute to the local Methodist church in Watkins where that was clearly not her purpose. There being no body in existence by the name of the Methodist Episcopal church which had legal capacity to take the gift it follows that the decree of the surrogate is erroneous and it should be reversed.

HOWARD, J., concurred.

Decree affirmed, with costs.

In the Matter of the Accounting of THE FARMERS' LOAN AND TRUST COMPANY, as Substituted Trustee under the Will of VALENTINE MOTT, Deceased.

DE LANCEY K. JAY, as Special Guardian of JOHN J. BOYD et al., Appellant; FANNIE VAN SCHAICK, Respondent.

(Court of Appeals, December, 1914.)

WILL—GIFT OF REMAINDER TO ISSUE OF BENEFICIARY OF LIFE ESTATE—WORD "ISSUE" HELD TO INCLUDE DESCENDANTS TAKING BY REPRESENTATION OR PER STIRPES.

1. It is the rule, in construing the provisions of a will, that the word "issue" is not confined to children but includes descendants in any degree, unless some other meaning is given to it by the context, and such

other meaning will not readily be given, if the result would be to divert the gift from the direct line of descent.

2. Testator after giving his residuary estate to his wife for life directed that upon her death the estate should be divided into nine equal parts, one-ninth to each of his seven surviving children, and two-ninths in trust for a granddaughter and a grandson and, then provided: "In case of the death of either of my children before the division of my estate, I give, devise and bequeath what would have been his or her share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share. If no issue, then I give, devise and bequeath such ninth part to my surviving children and the issue of those deceased." After directing the investment of the two-ninths given in trust and the payment of the income therefrom to the beneficiaries thereof during their respective lives, testator further provided: "Upon the death of either, I give, devise and bequeath his or her share to his or her issue, if any. If there be no issue, then to my surviving children and the issue of those deceased." The *cestui que trust* of one of the two trusts died leaving two daughters and four grandchildren, one, the child of one daughter, and three, the children of the other daughter. *Held*, upon examination of the provisions of the will and codicil, that since the will gave the share of such deceased beneficiary to her "issue," the word as used by testator is not limited to children but was used in the sense of descendants taking by representation, or *per stirpes*, and, hence, that the trust fund in question should be divided between the descendants of the deceased *cestui que trust*, *per stirpes*, and not *per capita*.

Matter of Farmers' Loan & Trust Co., 163 App. Div. 533, modified.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 10, 1914, reversing so much of a decree of the New York County Surrogate's Court as construed the fifth clause of the will of Valentine Mott, deceased.

The facts, so far as material, are stated in the opinion.

William Wickham Hoffman for appellant. The primary legal significance of the word "issue" is descendants of whatever degree of descent. (Seitz v. Faversham, 205 N. Y. 197; Schmidt v. Jewett, 195 N. Y. 486; Matter of Bauerdorf, 77 Misc. Rep. 656; Drake v. Drake, 134 N. Y. 220; Soper v. Brown, 136 N. Y. 244; Ross v. Ross, 20 Beav. 645.) The con-

text of this will and codicil clearly show the testator intended to use the word "issue" in question in its usual legal sense of "descendants," and there is nothing from which an intention can be found to limit its significance to "children." (*Drake v. Drake*, 134 N. Y. 223.) An intention to limit the significance of the word "issue" to children, in the fifth paragraph of the will, cannot be found from the fourth paragraph of the will. (*United States Trust Co. v. Tobias*, 21 Abb. [N. C.] 392; *Drake v. Drake*, 134 N. Y. 225; *Harrison v. McAdam*, 38 Misc. Rep. 18; *Jackson v. Jackson*, 153 Mass. 374; *Rasquin v. Hamersley*, 152 App. Div. 522; *Morron v. McMahon*, 35 Misc. Rep. 348.)

Henry A. Uterhart for respondent. The testator used the word "issue" throughout his will in the sense of children. (*Chwatal v. Schreiner*, 148 N. Y. 683; *Palmer v. Horn*, 84 N. Y. 516; *Palmer v. Dunham*, 125 N. Y. 68; *Soper v. Brown*, 136 N. Y. 244; *Murray v. Bronson*, 1 Dem. 217; *Daly v. Greenberg*, 69 Hun, 228; *Emmet v. Emmet*, 67 App. Div. 183; *Matter of Tenney*, 104 App. Div. 290; *Rasquin v. Hamersley*, 152 App. Div. 522, 208 N. Y. 630; *Edwards v. Edwards*, 12 Beav. 97.)

CARDOZO, J. — This case involves the construction of the will of Valentine Mott. He died in 1865, leaving a will and codicil. He gave his residuary estate to his wife for life. On her death he directed that the estate be sold and divided. We are concerned at this time with the distribution of the ninth part which he directed should be held in trust for his granddaughter, Fanny Mott. In the fourth subdivision of his will he said: "I give, devise and bequeath one-ninth part of the proceeds of such sale to each of my surviving children, and one-ninth part of such proceeds to Isaac Bell, Jr., in trust for Fanny Mott, daughter of my son, Valentine Mott, deceased, and one-ninth part of such proceeds to Isaac Bell, Jr., in trust for Valentine A. Blacque, son of my daughter, Olivia, deceased." In the same subdivision

he said: "In case of the death of either of my children before the division of my estate, I give, devise and bequeath what would have been his or her share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share. If no issue, then I give, devise and bequeath such ninth part to my surviving children and the issue of those deceased." By the fifth subdivision of the will he amplified the statement of his purpose in respect of the two shares which the preceding subdivision had already placed in trust. "The two several ninth portions of my estate devised to Isaac Bell, Jr., for my grandson, Valentine A. Blacque, and my granddaughter, Fanny Mott, respectively, I hereby declare to be upon the trust following: to invest such several ninth parts on bond and mortgage in City and State stocks or in other safe securities, and to collect, and after the majority of each to pay to each of them the net income of his or her respective share during his or her life. Upon the death of either I give, devise and bequeath his or her share to his or her issue, if any. If there be no issue, then to my surviving children and the issue of those deceased."

The granddaughter, Fanny Mott, afterwards became Fanny Mott Campbell. She died in 1912, leaving two daughters, Fanny Van Schaick and Lillie C. Boyd, and four grandchildren. One of these grandchildren is the child of Mrs. Van Schaick. Three of them are the children of Mrs. Boyd. The will gave this share of the estate, on the death of Mrs. Campbell, to her "issue;" and the meaning of that term as here used is the question for decision.

The surrogate held that the word issue meant descendants; that it was not limited to children; and that the division must be made *per capita* among the descendants of every degree. In that view, the two children of Mrs. Campbell, and the four grandchildren, were entitled, each of them, to one-sixth of the share in question. The Appellate Division held that the word issue was used in this will as synonymous with children; and hence that

the two children of Mrs. Campbell were entitled, each of them, to a half, and that the grandchildren were excluded. This construction is established, not only by the opinion of the Appellate Division, but also by its order, which adjudges "that the word 'issue' as used in that portion of the fifth clause of the will of Valentine Mott, deceased, reading 'upon the death of either, I give, devise and bequeath his or her share to his or her issue, if any,' be accorded the construction contended for by appellant, and was used by the testator in the sense of children."

We agree with the learned surrogate that the word issue was intended to include descendants; but we do not share his view that the gift was to be made *per capita*, with the result that children would take concurrently with their living parents. (*Soper v. Brown*, 136 N. Y. 244, 250.) We think that the will reveals a purpose that the issue should take *per stirpes*. This construction leads us to the same result that was reached at the Appellate Division, but by a different path. The difference, though not important in its consequences here, may be important when the case is cited as a precedent hereafter.

The rule is that unless some other meaning is given to it by the context, the word issue is not confined to children, but includes descendants in any degree. (*Schmidt v. Jewett*, 195 N. Y. 486.) Another meaning will not readily be given if the result would be to divert the gift from the direct line of descent. Where there is a gift to a child or grandchild for life, and over on the death of such child or grandchild in default of issue, the courts have held it to be "an unnatural construction which would exclude all but the immediate children of the first taker, in favor of the other branches of the family. The reasonable construction in such cases is that the gift over was intended to take effect only on the extinction of the line of descent from the first taker." (*Soper v. Brown*, 136 N. Y. 244, 251.) This testator provided that in case of the death of his children before the wife's life estate had terminated, their issue should take

their share, and only in default of issue was there a gift to others. To say that by the gift to issue he meant children, but not grandchildren, is to impute to him a purpose to disinherit one branch of descent to the enrichment of another. There is nothing in this will to justify us in deviating from the settled rule that a construction leading to such consequences ought generally to be avoided. (*Soper v. Brown*, *supra*, at p. 251; *Matter of Brown*, 93 N. Y. 295.) On the contrary this testator seems to have used the words children and issue, not at all as synonymous, but with accurate discrimination. We see this in many provisions, and notably in the codicil where he says: "Wherever the words child, children or issue, are used in my will, or in this codicil, I declare the same to mean lawful child, lawful children and lawful issue." We have no right to ascribe to the word issue a meaning less inclusive than its primary meaning of descendants in the absence of some tokens of a purpose that its application should be restricted. We do not find that such a purpose is revealed in this will.

We are thus brought to a consideration of the question whether the gift to the issue of Mrs. Campbell was one *per capita* or *per stirpes*. If it was *per capita*, children and grandchildren take concurrently. If it was *per stirpes*, they take by representation. (*Jackson v. Jackson*, 153 Mass. 374, 376; *Matter of Bauerdorf*, 77 Misc. Rep. 654; *Matter of U. S. Trust Co.*, 36 Misc. Rep. 378; *Coulden v. Coulden*, L. R. [1908] 1 Ch. 320, 326.) We think that it may fairly be gathered from the context that the gift was to be *per stirpes*. The presumption in this state favors a *per capita* distribution (*Schmidt v. Jewett*, *supra*; *Bisson v. West Shore R. R. Co.*, 143 N. Y. 125), but the presumption yields to "a very faint glimpse of a different intention." (*Ferrer v. Pyne*, 81 N. Y. 281, 284; *Vincent v. Newhouse*, 83 N. Y. 505, 513; *Bisson v. West Shore R. R. Co.*, *supra*.) To determine the meaning of the word issue in the fifth subdivision of the will, we must read the latter sub-

division in connection with the fourth. The first use of the word issue, we find in the provision: "in case of the death of either of my children before the division of my estate, I give, devise and bequeath what would have been his or her share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share." The fair meaning of this provision is that the issue are to take by right of representation. That construction is not precluded by the direction that they shall take equally. The word "equally," standing by itself, imports a division *per capita*, but it may get another meaning from the context. Another meaning is given to it here by the direction that the issue shall take their parent's share. (Barstow v. Goodwin, 2 Bradf. 413.) Equality of division is to be preserved, but only within the limits consistent with a division *per stirpes*. (Barstow v. Goodwin, *supra*; Jackson v. Jackson, 153 Mass. 374; Coates v. Burton, 191 Mass. 180.) We are referred to cases in which it is suggested that the word "issue" should be restricted to children when used in antithesis to the word "parent." (Sibley v. Perry, 7 Ves. 522; Drake v. Drake, 134 N. Y. 220, 225.) That is not a rule of construction. It is merely one consideration to be weighed with others in an estimate of a testator's meaning. (Ralph v. Carrick, L. R. [11 Ch. D.] 873; Matter of Birks, L. R. [1900] 1 Ch. 417, 419.) Sometimes the word issue may take its color from the word parent, and refer to children. Sometimes the word parent may take its color from the word issue, and refer to all who may occupy the position of parent throughout the line of succession. (Jackson v. Jackson, *supra*; Ross v. Ross, 20 Beav. 645; Robinson v. Sykes, 23 Beav. 40; Matter of Embury, 109 L. T. 511; Barstow v. Goodwin, *supra*.) Having in view the rule that favors the keeping of the gift within the primary line of descent, we think that by the gift to issue in the fourth subdivision of the will, there was intended a gift to descendants *per stirpes*.

If that is the meaning of the word issue as used in that subdivision, we may fairly hold that it did not lose that meaning and take on another one in the next subdivision. (*Ross v. Ross, supra*; *Matter of Birks, supra*.) We must keep in mind the unity of scheme that binds these subdivisions together. The fifth subdivision merely amplifies and develops a gift which takes its origin in the fourth. The trusts affecting two-ninths of the estate are established in one clause; the description of them is resumed, and they are made precise and definite, in another. This cohesion of plan must have tended to impress the testator with the belief that after defining his use of the word issue in one paragraph, it was needless to repeat the definition in the next. In all likelihood it never occurred to him that the need of such repetition would ever suggest itself to any one. He knew that the property disposed of in the fifth subdivision represented the shares of two deceased children, a son, Valentine, and a daughter, Olivia. He knew that if these children, instead of dying before the making of the will, had died afterwards, but before the division of the estate or even before the testator, the fourth subdivision would give their shares to their descendants in any degree and give it *per stirpes*. It is incredible that he contemplated a stirpital division among issue of children who died before him, but after the making of the will, and a *per capita* division among the issue of those children who died before him and before the making of the will. A rule which yields so readily as the one that presumes a *per capita* division, must give way where adherence to it involves a discrimination so unreasonable. A case closely parallel is *Dexter v. Inches* (147 Mass. 324). There a testator gave his estate in equal shares to eight children, and provided that, in case of the decease of either, leaving issue, before receiving a share, "such issue shall represent and take the parent's share." Seven of the children were to take their shares outright, but the share of one son was put in trust, such share to go at his decease, if he left no

widow, to his "issue," without more. The son died leaving no widow, but leaving three children, and also grandchildren. The court held that the gift to issue after the death of the son, though not stated to be to them by right of representation, must be held to have the same meaning as the gift to issue, where the son died before the testator, and hence that the issue took *per stirpes*. HOLMES, J., who wrote for the court, said: "Undoubtedly 'issue' may mean, and in this clause does mean, more than children. If one child of Charles had died at any time leaving children living at Charles' death, we will assume that they would not have been excluded. (See *Ralph v. Carrick*, L. R. [11 Ch. D.] 873, 882.) But 'issue' is a word which lends itself very easily to the expression of representation. (*Ross v. Ross*, 20 Beav. 645; *Robinson v. Sykes*, 23 Beav. 40, 51; *In re Orton's Trust*, L. R. [3 Eq.] 375, 380.) The issue of Charles would have taken by way of representation in one event. If Charles had died 'before the receipt of his share,' his issue would have 'represented' him by the words of the will. There is no reason for issue (the same word) taking the same sum otherwise than by way of representation in the other event, which has happened. If the context of the clause which we have to construe does not of itself show clearly in what sense the testator used the word, the alternative limitation makes it plain. We are of opinion that the word 'issue,' as here used, means descendants taking by way of representation." We think the same considerations are applicable to the will before us. It is true that the courts of Massachusetts, unlike the courts of this State, have at times construed a gift to issue as importing a division *per stirpes*, even without language suggestive of that intent, but the courts of both States agree in holding that the *per capita* rule will yield to slight indications of another meaning (*Ferrer v. Pyne*, *supra*), and we think that such indications are present here.

The order of the Appellate Division should be modified by striking therefrom the provision that the word "issue," as used

in the fifth clause of the will of Valentine Mott, was used by the testator in the sense of children, and by substituting a provision that it was used in the sense of descendants taking by representation or *per stirpes*, and as so modified the order should be affirmed, with costs to both parties payable out of the estate.

WILLARD BARTLETT, Ch. J., HISCOCK, CHASE, COLLIN, HOGAN and MILLER, JJ., concur.

Ordered accordingly.

In the Matter of the Accounting of HENRY R. C. WATSON,
as Surviving Executor and Trustee under the Will of WIL-
LIAM WATSON, Deceased, Appellant.

ELIZABETH T. WATSON et al., as Executors of WILLIAM
WATSON, Deceased, Respondents.

(Court of Appeals, December 1, 1914.)

WILL—PROVISIONS FOR TRUST—ADVANCEMENTS—WHEN INTEREST PROPERLY
CHARGED AGAINST SUMS ADVANCED TO BENEFICIARIES, WHO WERE ALSO
TRUSTEES OF THE ESTATE.

Testator, who left him surviving four sons and five daughters, appointed all four sons executors and trustees and gave his residuary estate to them, in trust, to sell and convert into money, which was to be divided into as many equal shares as there were children surviving. The shares of the daughters were to be held in trust and the income thereof paid to them during their respective lives. The sons' shares were also to be held in trust, but one-half of the fund for each was to be paid him when he attained the age of twenty-five years, the remainder to be held in trust during their respective lives. At testator's death three of the sons, who were twenty-five years of age, were each paid one-half of the principal of his share as nearly as the value thereof could then be estimated. Part of the land being of great prospective value had not been sold and under the authority vested in them by the will the trustees were holding it until that value could be realized. In order to equalize

the income and prevent injustice to any of the legatees by an erroneous estimate of the value of the shares, the sons were charged interest on the sums advanced to them, which was added to the other income earned by the estate and divided equally between the nine legatees. On four separate accountings, the accounts of the trustees were legally approved, on some of them under objection as to the charge of interest by the representatives of the estate of one of the sons and trustees, who had died, and they continued to charge interest on the advances to themselves. The present accounting is the fifth and covers the period since 1908. The land held by the trustees has now been sold with an increase of the estate in a large amount. The representatives of the deceased son and trustee have again objected to the charge of interest on the advances made to such trustee. The objection was sustained and the decree affirmed by the Appellate Division. *Held*, error; that the objection should have been overruled and the account approved; that interest on the advances for the common use of the nine shares was an appropriate method of adjusting the inequality that would otherwise have resulted from the exercise by the trustees of their trust powers for their private benefit; that the charge in controversy does not depend for its validity either upon contract or upon any legal default; and that it is a recognition of the equitable obligation of trustees when distributing a trust estate for their own benefit so to deal with it as to do equal justice to all the beneficiaries.

Matter of Watson, 163 App. Div. 656, reversed.

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered July 31, 1914, which affirmed so much of a decree of the Westchester County Surrogate's Court as sustained an objection to the accounts of Henry R. C. Watson, as surviving executor and trustee under the will of William Watson, deceased.

The facts, so far as material, are stated in the opinion.

James J. Allen for appellant. The decree dated July 14, 1913, rendered on the third accounting was *res adjudicata* that at the date thereof William had received in excess of his realized share about \$36,000; that such excess was in the nature of an "advance" and not a payment to which he was absolutely entitled, and the decree is conclusive as to the right and the duty

of the trustees to charge interest on such part of the excess of such advances over his realized share as might still remain unliquidated during the present accounting period. (*Legendre v. Scottish Ins. Co.*, 183 N. Y. 392; *House v. Lockwood*, 137 N. Y. 259; *Matter of Willetts*, 112 N. Y. 289; *Matter of Garth*, 10 App. Div. 100; *Kager v. Brenneman*, 47 App. Div. 63; 165 N. Y. 674; *Bowditch v. Ayrault*, 138 N. Y. 222; *Matter of Hoyt*, 160 N. Y. 607; *Rudd v. Cornell*, 171 N. Y. 114.)

Edward W. Davidson for respondents. The payments of \$130,000 to each of the sons of testator were payments on account of their shares of the estate, to which they were absolutely entitled, and were not loans to them by the trustees. (*Matter of Trustees, etc.*, 137 App. Div. 98; *House v. Lockwood*, 137 N. Y. 259.) The decree upon the third accounting did not adjudicate the nature of the payments, nor is it in any way binding or conclusive upon the question now before this court. (*Rudd v. Cornell*, 171 N. Y. 114; *Matter of Hunt*, 160 N. Y. 618; *Bowditch v. Ayrault*, 138 N. Y. 222; *Matter of Hamin*, 142 App. Div. 442; *Kirk v. McCann*, 117 App. Div. 59; *Matter of Elting*, 93 App. Div. 516; Code Civ. Pro. § 2742; *Chase v. Ewing*, 51 Barb. 597.)

CARDOZO, J. — William Watson, the elder, died in 1877, leaving a will and codicil. He was survived by nine children, four sons and five daughters. All four sons were appointed executors and trustees. They were directed by the will to sell and convert into money the entire residuary estate. The proceeds were to be divided into as many equal shares as there were children surviving. The daughters' shares were to be held in trust for their respective lives. The sons' shares were also to be held in trust, but one-half of the principal was to be paid to them as they reached the age of twenty-five years, and the other half as they reached the age of thirty-five years. Advances of

principal might be made to them before those times in the discretion of the executors if it seemed desirable to assist them in business, but not in excess of one-half of the amount to which they would probably or possibly be entitled. By a codicil the provision for the sons was modified by annulling the direction that the residue of their shares should be paid at the age of thirty-five, and by substituting a direction that the trusts in respect of that portion should continue during their several lives. The will states that the trustees, though required to sell the real estate, may defer the sale in their discretion during the life of the testator's wife, and advises, without, however, controlling the judgment of the trustee, that the sale be deferred to that extent in order that an increase of value may be gained.

At the time of their father's death, three of the four sons, William, the younger, Robert and Francis, had already arrived at the age of twenty-five. Each of them was, therefore, entitled to receive one-half of one-ninth of the residuary estate as soon as it was converted into money. The character of the estate made it inexpedient, however, that there should be a speedy sale of the land. Included in the land was a farm of two hundred and forty acres in a district then part of the town of Westchester and now part of the city of New York. It was believed, and rightly as the sequel proved, that the farm, if retained, would yield a large increase of value. To hold back the land from sale meant, of course, that the value of the sons' shares of the proceeds could not be determined at that time with certainty. It meant too that if the value was to be estimated as best it might, the payments, if presently made, must come out of the personal estate. That part of the estate had a value, according to the inventory, of \$731,751.27. To pay the sons out of this fund carried with it, however, a risk of injustice toward the daughters, and that in two ways. In the first place, there was the chance that the value of the shares, if determined in advance of a conversion of the whole estate, would be overesti-

mated, and there would thus be an overpayment of principal. In the second place, there was the certainty that the distribution of the personal property among the sons would give them the benefit of the bulk of the productive assets, and would leave the real estate, which was destined for many years to be largely unproductive, as the source of income for the daughters. The sons to whom the payments were due were also the trustees under the will, and in estimating the value of the estate and selecting the property to be converted into money, they were exercising their trust powers in their own behalf. Appreciating this conflict between their interests and their duties, they determined to fulfill the obligations of good faith and honor by insuring an equal division of the income among the sons and daughters. Soon after the probate of the will they paid to each of three sons William, Robert and Francis \$130,000 "as and for an estimated one-half of the one-ninth share of the testator's estate" devised and bequeathed to them. Later they paid to each an additional \$28,000 as a result of the increase of the estimate. To equalize the income they then charged themselves with interest, first at the rate of four, and later at the rate of five per cent. on the amount of these advances. This income was added to the other income earned by the estate; and the entire fund was then divided into nine equal parts. In that way sons and daughters retained the benefit of the land with its great prospective value, but the burden of carrying it during years of drought was ratably distributed.

The trustees had their first accounting in 1886. They showed the payments of principal which they had made to themselves, and also the charges which they had made against themselves to equalize the income. By that time, the fourth son, Henry, had reached the age of twenty-five; and the decree directed that a like payment of principal be made to him, "it being understood that the said sum * * * is an estimated amount and is subject to correction and alteration when said

executors and trustees shall have realized on the whole of the estate of the testator both real and personal." The trustees' accounts were approved; and they continued to charge themselves with interest on the amount of the advances.

In the year 1887 William Watson, Jr., died. During his life he had made no protest against the charge of interest which had been made against him as against his brothers. On the contrary, as one of the trustees, he had made the charge himself. He had recognized his obligation as a fiduciary to the other beneficiaries, and had been prompt to fulfill it. Objection came for the first time after his death and from those who succeeded to his share of the estate. There was a second accounting in 1898. The interest charges to equalize income were again approved. There was a third accounting in 1902. On this occasion the representatives of William Watson, Jr., objected to the charge of interest on his share; but by a decree made in 1904 the objection was overruled and the account approved. A fourth account, filed in 1908, was followed by a like objection and a like decree. The present accounting is the fifth, and covers the period since 1908. The farm has now been sold, with an increase of the estate to the extent of nearly a million dollars. Up to the date of the final conversion of the estate into money, interest, to equalize the income, has been charged on the advances as in previous years. Again the representatives of William Watson, Jr., have objected to the charge. On this occasion, however, the surrogate has refused to follow the precedent established by the earlier decrees. The objection has been sustained, and the ruling has been approved at the Appellate Division. On an appeal taken by the sole surviving trustee the case comes to this court.

We think that the attempt at this late day to nullify the apportionment of income to which William Watson, Jr., assented in his life, is not entitled to prevail. It is true that on reaching the age of twenty-five he had the right to receive a

moiety of one-ninth of the estate, but only after the estate had been converted into money. Until that time no one could say with certainty what the value of a ninth would be. He was himself one of the trustees. His brothers, who were entitled to similar payments, were also trustees. They did not limit themselves to an eighteenth part of so much of the estate as had then been converted. They took out of the personal estate an estimated eighteenth part of the entire estate. In doing this they did not elect to forego their interest in the land. They proposed to retain the advantage that would result from its future increase in value. They, or their successors in interest, have profited by that increase, and their shares of the principal, as appears by this decree, have been correspondingly increased. They could not so apportion the estate as to gain for themselves, through the postponement of a sale, the benefit of increased principal, and cast upon the other beneficiaries in the interval the entire burden of diminished income. They had a discretion as to the time of sale, but they could not appropriate to themselves all the gains that would have resulted from an immediate sale without relinquishing the profits resulting from its postponement. They were acting as trustees in a transaction that concerned them as individuals; and fundamental principles of equity forbade an administration of the trust by which an unfair profit would result to themselves to the detriment of others for whom the trust had been created. (*Mitchell v. Reed*, 61 N. Y. 123, 134.) The payment of interest on the advances for the common use of the nine shares was an appropriate method of adjusting the inequality that would otherwise have resulted from the exercise by the trustees of their trust powers for their private benefit. A similar rule has been adopted by the courts of England in giving effect to the hotchpot clause which is common in English wills. (*Willoughby v. Decies*, L. R. [1911] 2 Ch. 581, 600; *Matter of Rees*, L. R. [17 Ch. D.] 701.) "Hotchpot implies equality. The equality contemplated is equality at

the period of distribution. Although the testator has said nothing about interest upon advances, equality is to be achieved by charging interest from the period of distribution to the date of distribution." (Willoughby v. Decies, *supra*.) The charge of interest in such cases, as was said by Sir GEORGE JESSEL in Matter of Rees (*supra*), is merely an expedient which the courts have adopted to achieve equality. In this case the duty to achieve equality arose when distribution among the sons was made in advance of the conversion of the whole estate; it was emphasized by the fact that as trustees they were making distribution among themselves; and it was fittingly discharged through the award of interest. It would be unfortunate if this recognition of an obligation, sanctioned alike by considerations of honor and of established principles of equity, were now to be frustrated.

It is not an answer to say that the decree made in the accounting of 1886 confirmed the payments which the trustees had made to themselves and thereby adjudged that the payments involved no breach of duty. It confirmed at the same time the charges which the trustees had made against themselves for interest, and thus by implication adjudged that the payments and the charges must be sustained together. It is also not an answer to say that there was here no contract or default that would sustain a recovery of interest at law. (Matter of Trustees of N. Y. & Brooklyn Bridge, 137 N. Y. 95.) There are cases when interest is not recoverable at law, and is yet allowed by courts of equity. (Woerz v. Schumacher, 161 N. Y. 530, 538.) The charge in controversy does not depend for its validity either upon contract or upon any legal default. It is a recognition of the equitable obligation of trustees, when distributing a trust estate for their own benefit, so to deal with it as to do equal justice to all the beneficiaries.

The order should be reversed, with costs in both courts, and the matter remitted to the Surrogate's Court of Westchester

county for further proceedings not inconsistent with this opinion.

WILLARD BARTLETT, Ch. J., HISCOCK, CHASE, COLLIN, HOGAN and MILLER, JJ., concur.

Order reversed, etc.

J. HARRY HULL, as Trustee in Bankruptcy of the Estate of FRANCIS J. PALMER, Appellant v. FRANCIS J. PALMER et al., Respondents, Impleaded with Others.

(Court of Appeals, January, 1915.)

WILL—TESTAMENTARY TRUST—PROVISION THAT TRUST FUND BE PAID TO LEGATEE WHEN HE IS FINANCIALLY SOLVENT—PAYMENT OF SUCH FUND TO LEGATEE AFTER DISCHARGE IN BANKRUPTCY—WHEN TRUSTEE IN BANKRUPTCY CANNOT REOPEN PROCEEDINGS AND MAINTAIN ACTION TO REACH THE FUND.

A testator authorized his trustee to pay over to his son the principal of a trust fund upon a statement by the son that "he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund." The son was declared a bankrupt and discharged from his debts. The testamentary trustee thereupon, in pursuance of a decree of the Surrogate's Court, paid the trust fund over to him. Thereafter the estate of the bankrupt was reopened and the appellant as trustee in bankruptcy brought this action to reach the fund. *Held*, that the action cannot be maintained.

Hull v. Palmer, 155 App. Div. 636, affirmed.

APPEAL from a judgment entered March 31, 1913, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed a judgment of Special Term sustaining demurrers to and dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Walter S. Heilborn and David J. Gallert for appellant. Francis J. Palmer had an absolute right (independent of any exercise of discretion by the testamentary trustee) to the principal sum of \$50,000 when he should become financially solvent and able to pay his just debts and liabilities from resources other than the principal of the trust fund. (*Phillips v. Phillips*, 112 N. Y. 197; *Colton v. Colton*, 127 U. S. 300; *Bliven v. Seymour*, 88 N. Y. 469; *Meehan v. Brennan*, 16 App. Div. 395; *Decker v. High Street Church*, 27 App. Div. 408.) The bequest was not dependent upon the discretion of the trustee. (*Collister v. Bassett*, 163 N. Y. 281; *Colton v. Colton*, 127 U. S. 300; *Costabadie v. Costabadie*, 6 Hare, 410; *Dexter v. Evans*, 63 Conn. 58.) The bequest at bar is a conditional limitation. (*Leonard v. Barr*, 18 N. Y. 96; *Batley v. Hopkins*, 6 R. I. 443; *Montgomery v. Petriken*, 29 Penn. St. 118; *Whiting v. Whiting*, 42 Minn. 548; *Hoselton v. Hoselton*, 166 Mo. 182; *Taylor v. McCowen*, 154 Cal. 798.) A conditional limitation is an expectant estate. (L. 1909, ch. 52, §§ 35, 36.) Expectant estates are alienable. (*Nat. Park Bank v. Billings*, 144 App. Div. 536; 203 N. Y. 556; *Clowe v. Seavey*, 208 N. Y. 496; *Oppenheimer v. Billings*, 145 App. Div. 914; *Collister v. Fassett*, 163 N. Y. 281; *Lawrence v. Cooke*, 104 N. Y. 632; *Phillips v. Phillips*, 112 N. Y. 197; *Colton v. Colton*, 127 U. S. 300; *Matter of F. L. & Trust Co.*, 65 Misc. Rep. 418; *Chipman v. Montgomery*, 63 N. Y. 221; *Matter of Marx*, 117 App. Div. 890.) A trustee in bankruptcy takes property which prior to the filing of a petition in bankruptcy the bankrupt could by any means have transferred. (*Nat. Park Bank v. Billings*, 144 App. Div. 545; *Tuck v. Knapp*, 42 Misc. Rep. 140; *Matter of St. John*, 105 Fed. Rep. 234; *St. John v. Dann*, 66 Conn. 401.) The plaintiff having title to the remainder was entitled to the payment thereof when the contingency happened and neither the fact that the bankrupt estate has been closed and reopened nor the fact that the Farmers' Loan and Trust Company has

paid the trust fund to the defendant Palmer constitute good defenses. (*Hammond v. Whitredge*, 204 U. S. 538; *Kempner v. Bauer*, 53 Misc. Rep. 109; *Bilafsky v. Abraham*, 183 Mass. 401; *F. Nat. Bank v. Lancaster*, 196 U. S. 115; *E. L. Assur. Society v. Miller*, 185 Fed. Rep. 98.) The fact that there was a condition precedent to the right of Francis J. Palmer to possession of the principal of the trust fund is no defense. (*Matter of Hurlbut, Hatch & Co.*, 135 Fed. Rep. 504; *Matter of Ketchum*, 1 Fed. Rep. 840; *Page v. Edmunds*, 187 U. S. 596; *Matter of Fisher*, 98 Fed. Rep. 89; *Matter of Becker*, 98 Fed. Rep. 407; *Fisher v. Cushman*, 103 Fed. Rep. 860; *Matter of Wiesel*, 173 Fed. Rep. 718; *Matter of Cantelo Mfg. Co.*, 185 Fed. Rep. 276; *Matter of Warden*, 10 Fed. Rep. 275; *Matter of Wright*, 157 Fed. Rep. 544.)

Gerrit Smith for respondent Palmer. Francis J. Palmer, at the time of his adjudication in bankruptcy, had no right, title or interest in or to the said trust fund, which could or did vest in the plaintiff as his trustee in bankruptcy by virtue of the National Bankruptcy Act of 1898, nor any beneficial power over such trust fund which could or did pass to the said plaintiff as such trustee by virtue of the National Bankruptcy Act of 1898. (*Shipman v. Fanshaw*, 15 Abb. [N. C.] 288; *Shipman v. Rollins*, 98 N. Y. 311; *Matter of James*, 146 N. Y. 78; *Moak v. Moak*, 8 App. Div. 197; *Kimball v. Chappel*, 27 Abb. [N. C.] 437; *Purdy v. Haight*, 92 App. Div. 454; *Everett v. Everett*, 29 N. Y. 39; *Branhall v. Ferris*, 14 N. Y. 41; *F. Nat. Bank v. Miller*, 24 App. Div. 555.) The defendant Francis J. Palmer at the time of his adjudication in bankruptcy had no property which he could by any means have transferred. (*Noyes v. Blakeman*, 6 N. Y. 578; *Genet v. Hunt*, 113 N. Y. 168; *Cuthbert v. Chauvet*, 136 N. Y. 326; *Douglas v. Cruger*, 80 N. Y. 19; *Kenyon v. See*, 94 N. Y. 563.) The interest of Francis J. Palmer under the will of his father could not be reached by

levy. (Code Civ. Pro. § 1431.) The interest of Francis J. Palmer under the will of his father could not be reached by a judgment creditor's action. (Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 N. Y. 361; Wetmore v. Trunslow, 51 N. Y. 338; Kennedy v. Hoy, 135 N. Y. 134.) Francis J. Palmer had no interest or estate under the will of his father which could or did vest in the trustee in bankruptcy. (Nat. Bankr. Act. § 70.)

Frederick Geller and Edward H. Blanc for Farmers' Loan and Trust Company, respondent. The respondent Francis J. Palmer took under the will no interest in the principal of the trust fund which passed to the plaintiff, appellant, as his trustee in bankruptcy. (Matter of Wetmore, 108 Fed. Rep. 520; Matter of Hoadley, 101 Fed. Rep. 233; Matter of Ehle, 109 Fed. Rep. 625; Matter of Hogan, 194 Fed. Rep. 846; Nichols v. Eaton, 91 U. S. 716; Oppenheimer v. Billings, 145 App. Div. 914; Young v. Young, 127 App. Div. 130; Kenyon v. See, 94 N. Y. 563; Booth v. Baptist Church, 126 N. Y. 215; Hasbrouck v. Follett, 171 N. Y. 674.)

MILLER, J. — The plaintiff, a trustee in bankruptcy, seeks in this action to reach the principal of a trust fund bequeathed by the fourth clause of the will of Francis J. Palmer's father, which provides: "I give and bequeath and direct that there shall be paid as soon as conveniently may be after my death, to the Farmers' Loan and Trust Company, the sum of Fifty Thousand Dollars, to be held by said The Farmers' Loan and Trust Company, in trust, for the following uses and purposes, to wit: To invest said money and keep it invested in such securities as to my said trustee may seem proper, and to pay or apply the net interest or income thereof to or for the use of my son, Francis J. Palmer, quarterly during the term of his natural life. It is my wish in making this provision that my said son

shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee, upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund (which statement my said trustee may act upon without further investigation) or upon receiving such additional evidence of the facts as it in its judgment may require, to pay over to my said son, absolutely in its own judgment, and without its judgment in such case being subject to revision by any other person or authority, the principal of the said trust fund, and thereupon his receipt for said trust moneys shall be full justification and acquittal to the said trustee for the payment thereof. But if my said son Francis should die before the termination of this trust as above provided, then upon his death I direct my said trustee to divide and pay over the principal of said trust fund to the lawful issue of my said son him surviving, in equal shares, *per stirpes*, and in default of such issue to pay the income from said fund quarterly to my said daughter Rosalie H. Coleman during the term of her natural life, and upon the death of the survivor of my said son and daughter (there being no issue of my son him surviving) to divide and pay over the principal of said fund to the issue of my daughter Rosalie H. Coleman who shall then be living in equal shares *per stirpes*, to their own use, absolutely and forever." Said Palmer was adjudicated a bankrupt on his own petition on July 22d, 1907. On September 11, 1907, the plaintiff was appointed, and qualified as trustee, and on November 8th, 1907, he presented his report and was discharged. On May 7, 1908, said Palmer was duly discharged of all his debts. Thereafter the Farmers' Loan and Trust Company instituted a proceeding in the Surrogate's Court for the

judicial settlement of its accounts, wherein it was determined: "That the interest of the defendant Francis J. Palmer in and to the principal of said trust fund had by his discharge in bankruptcy become a vested interest and that the trust created by the 4th paragraph of the last will and testament of said Charles Palmer was thereby terminated, and that the condition in said will of said Charles Palmer contained was thereby fulfilled and said trust of said Fifty thousand dollars determined," and thereafter, and on the 24th day of August, 1910, the trust company paid over to Palmer in cash and securities the principal of said trust fund. On May 3, 1911, the estate of the bankrupt was reopened by the order of the United State District Court for the purpose of administering upon the principal of the said trust, and on May 19th, 1911, the appellant was reappointed trustee.

The decision in this case turns on the question whether the plaintiff upon his appointment, as trustee, on September 11, 1907, acquired title to any interest of the bankrupt under the said fourth clause of the will of his father, because, if he did not, there were no unadministered assets for him to be re-appointed to administer.

I shall assume that the testator bequeathed to his son a future contingent interest in the principal of the trust fund and that the trustee had no discretion but to pay it over, when the condition, upon which the trust was limited, was fulfilled, and I shall assume, also, that that interest was assignable under the authority of *National Park Bank v. Billings* (203 N. Y. 556). It does not necessarily follow that such contingent interest, though assignable, could be reached by creditors. It is to be observed that this is not a case in which a testator has undertaken to make a gift, and to keep it from his donee's creditors. It might in some aspects be termed a gift to encourage the donee to pay his debts, because, only by making such payment, or by showing the ability to pay, could the donee have the gift.

The condition was that the donee "shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund." The testator had a right to impose that condition. He had a right to keep his property away from his son's creditors by not giving it to the son at all, unless the latter was able to pay his debts from other resources, and in the plainest language the testator manifested an intention to do precisely that thing. Now the trustee in bankruptcy merely represents the creditors. If, upon his appointment, he acquired the contingent interest of the bankrupt, he could sell it, applying the proceeds to the payment of the bankrupt's debts. Then, upon the bankrupt's discharge, assuming that to be a payment of his debts within the intention of the testator, which may be doubted, the assignee would be entitled to demand the principal of the trust fund from the trustee. Thus, by a process of indirection the fund, which the testator gave to his son only on condition that he should become able to pay his debts, would be used for the very purpose of satisfying that condition, and of frustrating the testator's intention. The gift would vest upon the defeat of the testator's purpose, not upon the fulfillment of the condition imposed by him. It does not seem necessary, therefore, to indulge in definitions or in nice distinctions. The nature of the condition itself determines the controversy. The creditors or their representative, the trustee in bankruptcy, were prevented from acquiring the contingent interest of the bankrupt, because to permit this would prevent the gift from ever taking effect as contemplated by the testator upon the fulfillment of a valid condition imposed by him.

The plaintiff seeks to reach the fund on the theory that the trustee has wrongfully paid it over to the bankrupt. In that view the plaintiff's rights are certainly no greater than as though the trustee still held it. The condition then has not been satisfied, because certainly the donee's discharge in bankruptcy was

not a payment of his debts within the contemplation of the testator if his creditors prior to the discharge are at liberty to take the fund.

The judgment should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., HISCOCK, CHASE, HOGAN, CARDOZO and SEABURY, JJ., concur.

Judgment affirmed.

LENA BAUMANN, Respondent, v. HENRY C. STEINGESTER et al., Defendants, and MAGDALENA FUHGE, Appellant.

(*Court of Appeals, January, 1915.*)

WILL—ACTION FOR CONSTRUCTION—LATENT AMBIGUITY IN DESIGNATION OF LEGATEES—WHEN INSTRUCTIONS OF TESTATRIX TO ATTORNEY WHO DREW WILL NOT PRIVILEGED—ERRONEOUS EXCLUSION OF TESTIMONY OF SUCH ATTORNEY AS TO SUCH INSTRUCTIONS.

Where it appears by extrinsic evidence, in an action for the construction of a will, that there is a latent ambiguity in that the language used did not accurately designate either of two persons who claim to be one of the residuary legatees, parol evidence is properly receivable in the effort to dissolve this ambiguity, and where, at the time testatrix gave instructions to her attorney for drawing the will, she was accompanied by a woman, who lived with her as a companion and housekeeper, who remained in the room and within hearing of such instructions, the communications of testatrix to her attorney were not made in confidence, and, hence, were not privileged. It was error, therefore, to exclude the testimony of such attorney, when asked as to the instructions he had received from the testatrix as to the legacies and the provisions for the residuary estate, upon the ground that they were privileged communications within the meaning of sections 835 and 836 of the Code of Civil Procedure.

Baumann v. Steingester, 159 App. Div. 923, reversed.

APPEAL from a judgment of the Appellate Division of the Supreme Court to the second judicial department, entered De-

cember 23, 1913, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

John M. O'Neill for appellant. The evidence having presented a case of latent ambiguity, parol evidence was admissible to identify the legatee intended by the testatrix. (Matter of Woodward, 117 N. Y. 526; Jarman on Wills [6th ed.], 434; *In re Taylor*, L. R. [34 Ch. Div.] 255; *Henderson v. Henderson*, I. R. [1 Ch. Div. 1904] 353; *Patch v. White*, 117 U. S. 210; *Tilton v. Society*, 60 N. H. 377; *Lefevre v. Lefevre*, 59 N. Y. 434; *Trustees v. Cosgrave*, 4 Hun, 362; *Du Bois v. Ray*, 35 N. Y. 162; *Gallup v. Wright*, 61 How. Pr. 286; *Bowman v. Domestic & Foreign Missionary Society*, 100 App. Div. 29; 182 N. Y. 494; *Matter of Isbell*, 1 App. Div. 158; *Matter of Wheeler*, 32 App. Div. 183; 161 N. Y. 652.) It was error to exclude the testimony of Mr. Keller as to the instructions he received from deceased. (Matter of Chapman, 27 Hun, 573; *Matter of Chase*, 41 Hun, 204; *Sheridan v. Houghton*, 16 Hun, 628; 84 N. Y. 643; *Matter of Pirie*, 133 App. Div. 431; 198 N. Y. 209; *People v. Buchanan*, 145 N. Y. 26; *Doheny v. Lacy*, 168 N. Y. 213; *Matter of Cunnion*, 201 N. Y. 131.)

Anthony Darmstadt for respondent. Testimony of Mr. Keller, an attorney, was properly excluded. (Code Civ. Pro. §§ 835, 836; *Matter of Cunnion*, 201 N. Y. 123; *Rintelen v. Shaefer*, 152 App. Div. 727.)

SEABURY, J. — This action was commenced to obtain a construction of the last will of Maria Schadrack, deceased, and to have it adjudged that the plaintiff is the legatee described in subdivision 1 of paragraph "Third" of said will, and that she is one of the three residuary legatees referred to in paragraph

"Sixth" of said will. The appellant, Magdalena Fuhge, answered and asked to have it adjudged that she is the legatee described in the two paragraphs of the will referred to above. The question at issue upon the trial related to the identity of the legatee referred to as "Lena Baumann" in the following paragraphs of the will. Subdivision 1 of paragraph third provides that the testatrix gives "The sum of \$1,000 to my niece Lena Baumann of Richmond Hill in the County and Borough of Queens;" paragraph sixth provides that the testatrix gives "all the rest and residue of my estate to my three nieces, Helene Bang, Katherine Hainer, and Lena Baumann, to be divided among them share and share alike." The plaintiff is a grandniece of the testatrix, and at the time the will was made resided at Richmond Hill. The appellant is a niece of the testatrix, and her maiden name was Magdalena Baumann. There was evidence received upon the trial to show that the testatrix was accustomed to speak of her as "Lena Baumann," and that while she resided at the time the will was made at a place about one mile from Richmond Hill, the testatrix was also accustomed to refer to this place as "Richmond Hill." It thus appears that the language used in these two paragraphs of the will does not accurately designate either the plaintiff or the appellant. It does not accurately designate the plaintiff because the reference in the will is to a niece of the testatrix, and the plaintiff is a grandniece. It does not accurately designate the appellant because while her maiden name was Magdalena Baumann her name at the time the will was made was Magdalena Fuhge and she did not reside at Richmond Hill. These facts appearing by extrinsic evidence there was a latent ambiguity in the will. Parol evidence was properly receivable in the effort to dissolve this ambiguity. (*Lefevre v. Lefevre*, 59 N. Y. 434; *Matter of Taylor, Cloak v. Hammond*, L. R. [34 Ch. Div.] 255; *Henderson v. Henderson*, 1 Ir. Rep. [1905] 353.) In view of the unanimous affirmance by the Appellate Division of the judg-

ment appealed from, the single question which survives for consideration in this court relates to the rulings of the Special Term excluding the evidence of the witness Kellar. Mr. Kellar was the attorney for the testatrix and was the draftsman of and a subscribing witness to her will. The testatrix, a woman about seventy years of age, called upon Mr. Kellar and gave him instructions as to the drawing of her will. With her on this occasion and present at the office of Mr. Kellar at the time was Mrs. Stiefhold. Mrs. Stiefhold lived with the testatrix and acted as companion and housekeeper. The instructions as to her will were given to Mr. Kellar in the presence of Mrs. Stiefhold, who, while within hearing, testified that she "did not pay very much attention." When Mr. Kellar was called as a witness he was asked as to the instructions he had received from the testatrix as to the legacies and the provisions for the residuary estate. The question was excluded under objection of the plaintiff and subject to the exception of the appellant. It thus becomes necessary to determine whether Mr. Kellar, the attorney, should have been permitted to testify to communications which took place between himself and his client, the testatrix, in the presence of Mrs. Stiefhold. This evidence should have been received and considered by the court below. (*Doheny v. Lacy*, 168 N. Y. 213, 223; *People v. Buchanan*, 145 N. Y. 1, 26; *People v. Hayes*, 140 N. Y. 484, 495; *Brennan v. Hall*, 131 N. Y. 160, 165; *Matter of Eckler*, 126 App. Div. 199, 203; *People v. Bloom*, 124 App. Div. 767; *Matter of Barnes*, 10 App. Div. 523, 527; *Lecour v. Importers & Traders National Bank*, 61 App. Div. 163, 168; *Matter of Smith*, 61 Hun, 101, 104; *Matter of McCarthy*, 55 Hun, 7, 11. See, also, *People v. Andre*, 153 Mich. 531, 539; *Scott v. Aultman Co.*, 211 Ill. 612, 615; *Roper v. State*, 58 N. J. L. 420.) Mrs. Stiefhold was not present and acting in the character of a confidential agent of the testatrix, nor was her presence necessary to enable the parties to communicate with each other. No attempt was made by the testa-

trix to prevent her hearing the communication which she made to her attorney. The fact that Mrs. Stiefhold did "not pay very much attention" to what was said does not alter the situation. She was within hearing and so far as the testatrix knew heard all that was said. If the testatrix had desired her communication with her attorney to be confidential she could have asked Mrs. Stiefhold to withdraw from the room or have communicated with her attorney when Mrs. Stiefhold was not present. She did not do either of these things, but on the contrary gave her instructions to her attorney as to the manner in which she wished to have her will drawn, in the presence of Mrs. Stiefhold. The fact that these instructions were given in the presence and in the hearing of Mrs. Stiefhold is a circumstance indicative of the fact that the communication was not made in confidence. A third person even though a mere stranger or bystander in whose hearing communications are made by a client to an attorney may testify to such communications. (*Jackson v. French*, 3 Wend. 337; *People v. Buchanan*, *supra*.) To allow a stranger or bystander who overhears such a conversation to testify to what he heard and at the same time preclude the attorney of the client from giving his testimony as to what occurred might often result unfairly to the client for whose protection the privilege is designed. The communication not being confidential the attorney is not privileged from disclosing it. Where there is no confidence reposed, no privilege can be asserted. In such cases the attorney is permitted to testify not because the privilege has been waived, but because the communication, not having been made in confidence, was not privileged. The privilege which exempts one from giving testimony, except in so far as it is embodied in statutory provisions, cannot be extended to cover cases not within the reason upon which the privilege rests. The provisions of sections 835 and 836 of the Code of Civil Procedure apply only to those communications which are confidential in their nature, and, therefore, these

sections are without application to the facts of this case. In certain cases in other jurisdictions a distinction has been attempted which permits the third person hearing such communications to testify, but holds the attorney bound to secrecy. (Gallagher v. Williamson, 23 Cal. 332; Blount v. Kimpton, 155 Mass. 378; Hartness v. Brown, 21 Wash. 655.) Such a distinction is without support in the reasons underlying the privilege which rests not only upon the professional character of the employment, but also upon the confidential nature of the communication. Nor does the supposed distinction find support in the adjudications made in this State which are referred to above.

The statement made in the opinion in *Butler v. Fayerweather* (91 Fed. Rep. 458, 461) that "the circumstance that other witnesses were present at the time when the codicil is alleged to have been executed and published, even though they heard all that took place, and were aware of the contents of the instrument, is wholly immaterial," is not an accurate statement of the rule prevailing in this State and is not in accord with the authorities already cited.

The judgment should be reversed and a new trial granted, with costs to abide the event.

WILLARD BARTLETT, Ch. J., HISCOCK, CHASE, HOGAN,
MILLER and CARDOZO, JJ., concur.

Judgment reversed, etc.

HARLOW W. BAILEY, Appellant, v. BUFFALO LOAN, TRUST AND
SAFE DEPOSIT COMPANY et al., Respondents.

(Court of Appeals, January 12, 1915.)

**WILL—TESTAMENTARY TRUSTS—WHEN ALL PROVISIONS OF A TRUST MUST
BE CONSTRUED TOGETHER AND STAND OR FALL TOGETHER—TRUST PRO-
VISIONS OF A WILL CONSTRUED AND HELD IN VIOLATION OF THE STATUTE
OF PERPETUITIES.**

1. Where the trusts in the will are connected together so as to constitute an entire scheme, and the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, and manifest injustice would result from such construction to the beneficiaries, all provisions of the trust must be considered together and all must fall.

2. This rule applied in this action brought for the construction of one clause of a will quoted in the opinion and for an accounting by trustees, and *held*, that the testator surrounded the disposition of the trust by provisions in violation of the statutes relating to perpetuities and ownership and alienation of personal property; that the predominating purpose for which the trust was attempted to be created was dependent upon the validity of the whole trust, which cannot be carried out, and the entire trust must fall. *Further, held*, that the plaintiff, as residuary legatee, is entitled to the avails of the trust fund; that any payments of income, made by the trustee under the will, to July first subsequent to the commencement of the action cannot be recovered by the plaintiff from the parties to whom payment was made or their representatives; that the infant defendants had no vested right under the fourth clause of the will, and that the Statute of Limitations is not a bar to this action.

Bailey v. Buffalo Loan, Trust & Safe Deposit Co., 159 App. Div. 933, reversed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 17, 1913, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

Daniel E. Bailey died at the city of Buffalo about March 3d,

1894, leaving a widow now deceased, and the plaintiff, Harlow W. Bailey, his sole heir at law and next of kin. At the time of the death of the testator, he also left a brother, Alanson C. Bailey, a sister, Caroline E. Blair, since deceased, a friend Mary E. Swain, who died in October, 1899, and at the time of his death the defendant Dorothy Bailey, a daughter of the plaintiff, was then living and of the age of about two years. Subsequent to the death of the testator, there was born to the plaintiff, Harlow W. Bailey, three other children who are now living and the mother of said children, the wife of the plaintiff, Harlow W. Bailey, is still alive. The last child was born on July 27th, 1903.

Daniel E. Bailey left a last will and testament which was admitted to probate by the surrogate of Erie county March 22d, 1894, by the terms of which the plaintiff and the Buffalo Loan, Trust and Safe Deposit Company were designated as executors. Letters testamentary were issued to said executors and they duly qualified as such.

After providing for the payment of debts and funeral expenses, the testator, by the will in question, gave to his wife the sum of eighty thousand dollars together with household furniture, to his sister Caroline E. Blair the sum of five thousand dollars in addition to all debts, dues and demands which the testator held against the husband of said Caroline E. Blair. The fourth clause of the will, which is the subject of controversy in this action, is as follows:

"Fourth. I direct that bonds of the Toledo Consolidated Street Railroad to the amount of sixty thousand dollars be deposited in trust with the Buffalo Loan, Trust and Safe Deposit Company of Buffalo, N. Y., as trustee, and in case at the time of my decease, I should not be possessed of the above bonds, then the same amount in cash or other good securities be placed in the hands of said Buffalo Loan, Trust and Safe Deposit Company, as a trust fund, the income of which, after paying the

expenses of such trust, I direct to be paid as follows: Fifty Dollars per month to my brother, Alanson C. Bailey of Toledo, Ohio, during his natural life; thirty dollars per month to Mrs. Mary A. Swain, of Buffalo, N. Y., during her natural life, and the remainder of said income to my son, Harlow W. Bailey, during his natural life, or until the trust shall terminate, as hereinafter stated. And in case of the death of either of my said brother, Alanson C. Bailey, or Mrs. Mary A. Swain, then their proportions of said income shall be paid to my said son Harlow W. Bailey, and in case of the death of my said son, Harlow W. Bailey, then I direct that his share of said income shall be added to the principal sum of said trust. The principal of said trust fund of sixty thousand dollars, I direct to be held in trust by the said Buffalo Loan, Trust and Safe Deposit Company for the children of my said son, Harlow W. Bailey, and I direct that each child of my said son, Harlow W. Bailey, shall have and receive his or her portion of said trust fund upon his or her arriving at the age of twenty-one years, and then to take such proportion of said principal sum as the number of children then living and minors shall bear towards the principal sum then undivided, so that if there be three children living when the oldest becomes twenty-one years of age, such oldest child shall receive one-third of said principal sum of said trust fund, and if another child shall be born after the oldest child has become twenty-one years of age, and shall have received his or her proportion of said trust fund, then the second child shall upon becoming twenty-one years of age, have and receive one-third of the remaining principal of said trust fund. And in case there be no children of my said son, Harlow W. Bailey, living at the time of my decease, or in case the children then living shall die before arriving at the age of twenty-one years, then I direct that the trust hereby created shall continue for twenty-five years from the date of this will, and if at that time there be no children of my said son, Harlow W. Bailey, living,

I direct that the trust hereby created shall cease and be determined, and I hereby direct that the principal of said trust fund shall then be paid to my son, Harlow W. Bailey, and the same shall be his property absolutely, and forever, and if at that time my said son, Harlow W. Bailey, shall not be living, then I direct that the principal of said trust fund shall be divided and paid over, share and share alike, to the heirs of my said sister, Caroline E. Blair, of Madison, Ohio. But if there be a child of my said son, Harlow W. Bailey, living twenty-five years from the date of this will, though born after my decease, then said trust hereby created shall continue for the benefit of such child."

By the terms of the residuary clause of the will the testator gave, devised and bequeathed all the rest, residue and remainder of his estate to the plaintiff.

Immediately after the probate of the will, the defendant Buffalo Loan, Trust and Safe Deposit Company, hereinafter mentioned as the trust company, took possession of the assets mentioned in the fourth clause of the will, and retained such possession until about July, 1899, when the bonds were converted into cash and the proceeds reinvested by it. During the time that the trust company had possession of the bonds or the proceeds of the same, it continued down until July 1st, 1911, subsequent to the commencement of this action, to pay Alanson C. Bailey the sum of six hundred dollars per year, paid Mary A. Swain to the time of her death, October, 1899, the sum of three hundred and sixty dollars per year, and down to said July 1st, 1911, paid to the plaintiff herein the balance of the income received by it, after deducting its commissions, in each instance taking receipts from the parties to whom payments were made.

On or about February 2d, 1895, the executors paid to plaintiff the sum of one hundred and seventy thousand dollars, the amount of the residuary estate, and took from him a receipt in the usual form, consenting to the entry of a decree by the surrogate discharging the executors, and thereafter and on January

29th, 1899, a decree was duly entered discharging the executors as such.

This action was commenced on or about May 19th, 1911, to secure a judgment determining that the fourth clause of the will of Daniel E. Bailey, deceased, be declared illegal and void, and that the sum of sixty thousand dollars held by the trust company together with the interest and accumulations and proceeds thereof be adjudged and determined to belong to the plaintiff, and that the trust company account therefor to plaintiff.

The trust company denied the invalidity of the fourth clause of the will of the testator, and asserted as separate defenses the probate of the will; that plaintiff was estopped by reason thereof from questioning the validity of the same as well as by his acts as one of the executors in administering the estate and the final accounting in the Surrogate's Court, and the setting aside of the securities for the trust company, as well as by his acquiescence in the distribution of income, and further set forth as a defense the Statute of Limitations. The defendant Alanson C. Bailey relied upon the Statute of Limitations as a defense to the action.

Aaron Fybush and Frank C. Ferguson for appellant. The plaintiff had the right to bring this action and is entitled to obtain a judicial construction of the fourth clause of the will purporting to create a trust, he being sole residuary legatee under the will and sole next of kin of the testator. (*Wager v. Wager*, 89 N. Y. 161; *Read v. Williams*, 125 N. Y. 560; *Kalish v. Kalish*, 166 N. Y. 368; *Casey v. Casey*, 161 App. Div. 427.) The fourth clause of the will is wholly illegal. (*Colton v. Fox*, 67 N. Y. 351; *Tilden v. Green*, 130 N. Y. 29; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 92; *Matter of Wilcox*, 194 N. Y. 288; *Schettler v. Smith*, 41 N. Y. 328; *Knox v. Jones*, 47 N. Y. 389, 397; *Hawley v. James*, 16 Wend. 121; *Purdy v. Hayt*, 92 N. Y. 446; *Haynes v. Sherman*, 117 N. Y. 433; *Dana*

v. Murray, 122 N. Y. 604.) The trust failing, the annuities to be paid out of the trust fund fail with it. (Colton v. Fox, 67 N. Y. 348; People's Trust Co. v. Flynn, 188 N. Y. 385.) The appellant has not waived his right to maintain this action, nor is he estopped, if the trust shall be held to be invalid, from insisting that the defendant trust company should account to him for his money wrongfully paid out by it to other persons. (O'Connor v. Gifford, 117 N. Y. 275.) The Statute of Limitations has not run. (Giraud v. Giraud, 58 How. Pr. 175; Decouche v. Savetier, 3 Johns. Ch. 190, 216; Goodrich v. Pendleton, 3 Johns. Ch. 384; Coster v. Murray, 5 Johns. Ch. 522; Murray v. Coster, 20 Johns. 582; Davis v. Davis, 86 Hun, 400.)

Lincoln A. Groat for Buffalo Loan, Trust and Safe Deposit Company, respondent. The judgment appealed from which eliminates the invalid and contingent limitations over contained in the fourth clause of the will in question and sustains the trust to the extent of the valid provisions contained in the first paragraph of said clause, thus effectuating in the main the purposes of the testator, should be affirmed. (Kennedy v. Hoy, 105 N. Y. 137; Haskall v. King, 162 N. Y. 134; Kalish v. Kalish, 166 N. Y. 368; Schey v. Schey, 194 N. Y. 368; Henderson v. Henderson, 113 N. Y. 1; Schettler v. Smith, 41 N. Y. 328; Manice v. Manice, 43 N. Y. 303; Post v. Hover, 33 N. Y. 593; Mee v. Gordon, 187 N. Y. 410; Robinson v. Martin, 200 N. Y. 159.) The provisions of the first paragraph of the fourth clause of the will of Daniel E. Bailey, deceased, creating the trust fund in question, when properly construed, in the light of the facts and circumstances as they existed at the time of testator's death, are not illegal and void, and do not unlawfully suspend the power of alienation of said trust fund, but provide for a lawful and valid trust. (Morton Trust Co. v. Sands, 195 N. Y. 28; People's Trust Co. v. Flynn, 188 N. Y. 393; Whitson

v. Whitson, 53 N. Y. 481; *Ex parte* McComb, 4 Bradf. 152; Provost v. Provost, 70 N. Y. 141; Kahn v. Tierney, 135 App. Div. 897, 201 N. Y. 516; Buchanan v. Little, 154 N. Y. 147; Tiers v. Tiers, 98 N. Y. 568; Crooke v. County of Kings, 97 N. Y. 421.) The provisions of the fourth clause of the will in question constitute a valid and lawful trust during the natural lives of both Alanson C. Bailey and Mary A. Swain, and upon the death of the survivor of them the title to the trust fund in question vests absolutely in the testator's grandchildren then living. (Crooke v. County of Kings, 97 N. Y. 445; Kennedy v. Hoy, 105 N. Y. 134.) Plaintiff's cause of action is barred by the Statute of Limitations. (Code Civ. Pro. § 388; Gilmore v. Ham, 142 N. Y. 1; Roberts v. Ely, 113 N. Y. 128; Lammer v. Stoddard, 103 N. Y. 672; Matter of Smith, 66 App. Div. 340; Matter of Rogers, 153 N. Y. 316; Matter of Longbotham, 38 App. Div. 607.) The plaintiff is estopped from maintaining this action. (Rothschild v. Title G. & T. Co., 204 N. Y. 464; Steinway v. Steinway, 163 N. Y. 183; Williams v. Whittell, 69 App. Div. 340; Trustees, etc., v. Smith, 118 N. Y. 634; Starr v. Selleck, 145 App. Div. 869, 205 N. Y. 545; Chipman v. Montgomery, 63 N. Y. 221; Dunlap v. Gill, 23 Misc. Rep. 418, 39 App. Div. 638; Matter of Marx, 117 App. Div. 890; Matter of Oltmans, 53 Misc. Rep. 208; Matter of Russell, 168 N. Y. 177.) The decree of the Surrogate's Court made upon the petition and release of the plaintiff on the 23d day of January, 1899, ratifying and confirming the accounting had between the executors of the will of Daniel E. Bailey, deceased, and the plaintiff herein, the sole residuary legatee named in said will, and discharging said executors, is a judicial determination that said executors have fully and satisfactorily accounted to the plaintiff for the entire residuary estate of Daniel E. Bailey, deceased, and is *res adjudicata* that the plaintiff has received from said executors the entire residuary estate of his father, to which he is entitled. (Code Civ. Pro. §§ 2514, 2742, 2743;

Chester v. Buffalo Car Mfg. Co., 183 N. Y. 435; Altman v. Hofeller, 152 N. Y. 502; Gill v. Brouwer, 37 N. Y. 551.)

Frank Gibbons for Alanson C. Bailey, respondent. Plaintiff's cause of action is barred by the ten years' Statute of Limitations. (Code Civ. Pro. § 388; Roberts v. Ely, 113 N. Y. 128; Rundle v. Allison, 34 N. Y. 180; Mills v. Mills, 115 N. Y. 80; Hubbell v. Medbury, 53 N. Y. 98; Lammer v. Stoddard, 103 N. Y. 672; Yeoman v. Townshend, 74 Hun, 625; Middleton v. Twombly, 125 N. Y. 520, 524; Gilmore v. Ham, 142 N. Y. 1.) The trust is valid so long as the life estate of Harlow W. Bailey is concerned and the annuity to this respondent, Allanson C. Bailey, is valid even should such life estate fail to be terminated because in either event his annuity could be computed and paid to him. (Wells v. Rowland, 155 App. Div. 351; Schettler v. Smith, 41 N. Y. 328; Haskell v. King, 162 N. Y. 134; Manice v. Manice, 43 N. Y. 303; Kennedy v. Hoy, 105 N. Y. 134; Schey v. Schey, 194 N. Y. 368; Hawley v. James, 16 Wend. 60; Van Schuyver v. Mulford, 59 N. Y. 426; Cochrane v. Schell, 140 N. Y. 516; Herzog v. Title Guarantee & Trust Co., 177 N. Y. 86.)

H. B. Van Peyma for Dorothy Bailey et al., respondents. Plaintiff's right to sue for construction of the will which he construed in accordance with what he conceived to be his own interests for over sixteen years is barred by his laches, acquiescence, the doctrine of stale claims and by his own consent to administer the will without a construction thereof, except that adopted by plaintiff, in 1894. (Rome Ex. Bank v. Eames, 1 Keyes, 588; Chester v. Buffalo Car Mfg. Co., 70 App. Div. 443; Ashe v. Ashe, 113 N. Y. 232; Groesbeck v. Morgan, 206 N. Y. 385; McKechnie v. McKechnie, 3 App. Div. 91; Calhoun v. Millard, 121 N. Y. 69; Conkling v. Weatherwax, 181 N. Y. 267; Lockwood v. Brantley, 3 N. Y. S. R. 648.) The action

is barred by the Statute of Limitations. The court was not called upon to construe this will, and the right to a judicial construction thereof has been barred by time and statute, in the absence of allegation and proof showing a necessity therefor. (Gilmore v. Ham, 142 N. Y. 1; Matter of Smith, 66 App. Div. 340; Matter of Rogers, 153 N. Y. 316; Matter of Longbotham, 38 App. Div. 607; Roberts v. Ely, 113 N. Y. 128; Matter of Neilley, 95 N. Y. 382.) Even if in part obnoxious to the statute, the will of Bailey should be upheld as creating a trust for the benefit of his only son, resulting in the ultimate protection of the infants. (Henderson v. Henderson, 113 N. Y. 16; Kalish v. Kalish, 166 N. Y. 374; Becker v. Becker, 13 App. Div. 345; Schermerhorn v. Cutting, 131 N. Y. 48; Oxley v. Lane, 35 N. Y. 340.)

HOGAN, J. — Upon the first trial of this action the trial justice held (75 Misc. Rep. 23) that the fourth clause of the will of the testator was void, and judgment was accordingly entered requiring the trustee to pay over to the plaintiff the trust fund and accumulations thereof then on hand.

Upon appeal from that judgment, the Appellate Division held (151 App. Div. 166) that the provision of the will in question for the children of the plaintiff contravened the statute against perpetuities; that the provision for the continuance of the trust for twenty-five years with limitation over was unlawful; that the provision for Alanson C. Bailey and Mary A. Swain were annuities chargeable against the income, and that the trust fund need not on that account be extended beyond the life of the plaintiff, as the present value of the annuities could be ascertained at his death, paid, and the fund freed from the claims of the annuities, and the remainder might then be distributed under the residuary clause of the will; that as to the surviving annuitant, Alanson C. Bailey, Mrs. Swain being dead, whatever grounds had theretofore existed for questioning the

provision to Alanson C. Bailey were removed by the death of Mrs. Swain, and the trust having been thereafter continued for years and recognized by plaintiff as valid, his acts, while not amounting to an equitable estoppel, were sufficient to support a finding that after the death of Mrs. Swain the plaintiff waived any objection to the validity of the provision of the will for the surviving life annuitants and thereby confirmed the original trust to the life beneficiaries, so there was now a valid and existing trust for their benefit as the will provides except as to the provision for Mrs. Swain which had been fully carried out. The judgment was reversed and a new trial ordered.

Upon the retrial of the case, the trial justice found as matter of law:

"That the fourth clause of the will attempts to suspend the absolute ownership of the trust fund referred to therein and made the subject of the trust for a period beyond the termination of two lives in being at the death of the testator.

"That the fourth clause of the will attempts to suspend the power of absolute alienation of the fund that is made the subject of the trust for a period beyond the termination of two lives in being at the death of the testator.

"That the fourth clause of the will contains directions for the accumulations of income for periods and for purposes not sanctioned by either the first or second subdivisions of section sixteen of the Personal Property Law."

The court further found that the question of the validity of the fourth clause of the will was not in any manner involved in the proceeding for the probate of the will or in the proceeding by which the executors were discharged as such; that the provisions of the will, so far as the same provided for the payment of income to Alanson C. Bailey and Mary A. Swain, having been fully executed as to the provision for Mary A. Swain up to the time of her death in October, 1899, and thereafter the trust having been continued without objection for upwards of

eleven years and administered according to the terms and provisions of said will and recognized by the plaintiff as a lawful and valid trust, constituted a valid and lawful trust for the surviving life beneficiaries named in said will, Harlow W. Bailey and Alanson C. Bailey, consequently any legal objections the plaintiff might have urged against the validity of the trust created by the fourth paragraph of the will as constituting an unlawful suspension of the power of alienation prior to the death of Mary A. Swain, have been waived and abandoned by him, and by his acquiescence in the administration of said trust fund after the death of Mary A. Swain he had ratified and confirmed the original trust and yielded to the trustee and the life beneficiaries their respective rights therein as defined by the provisions of the will. The complaint was dismissed upon the merits. The judgment entered was unanimously affirmed by the Appellate Division.

Counsel for the trust fund in his brief concedes that the provisions contained in the will relating to the holding of the trust fund in certain remote contingencies for a period of twenty-five years, and the contingent limitations over, are illegal and void, but asserts that the illegal and void provisions have no relation to the primary trust for the benefit of the plaintiff and his children and are separable therefrom.

Counsel for the respondent Alanson C. Bailey makes the same concession in the brief presented in his behalf and insists that the illegal portion of the fourth clause of the will may be separated from the earlier clause and the latter provision for the payment of an annuity to Alanson C. Bailey be sustained.

The guardian *ad litem* filed a brief in which he urges estoppel by plaintiff by reason of laches and acquiescence. He also adopted the argument presented by the briefs of the co-respondents and urged that the will should be upheld as creating a trust for the benefit of plaintiff which would result in the ultimate protection of the infants.

All of the respondents plead the Statute of Limitations.

We concur in the conclusion of the trial justice that the fourth clause of the will of the testator is invalid in that it contravenes the statute inhibiting the suspension of the absolute ownership of the fund of \$60,000 for a period of more than two lives in being at the time of the death of the testator. In view of that determination in connection with the concession of counsel for the respective respondents it will be only necessary to treat of the remaining questions decided by the trial justice which were affirmed by the Appellate Division.

The clause of the will of Mr. Bailey as the same appears in the record is embodied in a single paragraph and must be considered as a whole. The rule is well established that when some of the trusts in a will are legal and some illegal, if they are connected together so as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or some of them, then all of the trust provisions must be construed together and all must be held illegal. (*Manice v. Manice*, 43 N. Y. 303; *Knox v. Jones*, 47 N. Y. 389; *Van Schuyver v. Mulford*, 59 N. Y. 426; *Kennedy v. Hoy*, 105 N. Y. 135; *Tilden v. Green*, 130 N. Y. 29.)

Respondents ask us to apply the rule which permits unlawful trusts to be eliminated from a will, and those which are lawful to be enforced. The court will at all times give full effect to the intention of the testator, provided always that such intent does not violate provisions of the statutes or well-established principles of law. It is not permissible for the court to violate the intention of the testator or interfere with the general plan created by the testator for the disposition of his property.

An examination of the will discloses that the intention of the testator was to provide generous bequests to his wife and his sister, and the residue of his estate to his only child, the plaintiff

in this action, who was then married and had one child about two years of age. His paramount purpose in the creation of the trust fund was to provide for his grandchildren living at the time of his death or thereafter born, the income from the same to be paid fifty dollars per month to his brother, Alanson C. Bailey, during his life, thirty dollars per month to Mary A. Swain, a friend, during her life, and the remainder of the income to the plaintiff during his natural life "*or until the trust shall terminate as hereinafter stated.*" In the event of the death of Alanson C. Bailey or Mary A. Swain, their proportions of the income were to be paid to the plaintiff, but in case of his death his share was to be added to the principal sum of the trust. The scheme of a distribution of income, as will be observed, was to pay over the same during a period extending beyond the termination of two lives in being at the testator's death unless the trust should terminate as thereafter stated in the will, which termination is provided for in a later portion of said fourth clause as follows: "In case there be no child of my said son Harlow W. Bailey living at the time of my decease, or in case the children then living shall die before arriving at the age of twenty-one years, then I direct that the trust hereby created shall continue for twenty-five years from the date of this will, and if at that time there shall be any children of my said son Harlow W. Bailey living I direct that the trust hereby created shall cease and be determined."

The principal of the trust sought to be created was to be held for the children of the plaintiff, each child to receive his or her proportion upon attaining the age of twenty-one years, the proportion to be dependent upon the number of children, minors, then living. The right of any child or children of the plaintiff to a portion of the principal was contingent upon each child attaining the age of twenty-one years. As minors the child or children of plaintiff would not be entitled to a distributive share of the fund. The death of any of said children during his or

her minority would not result in an estate therein descendible as the interest of such child in the fund was contingent, rather than a vested remainder in the same.

The trust for a payment of the income of the trust fund was subordinate to the disposition made of the principal, consequently the creation of the trust fund and disposition of the same, both income and principal, was so closely allied that they are inseparable. The testator in his earnestness to provide for his grandchildren surrounded the disposition of the trust by provisions in violation of the statutes relating to perpetuities and ownership and alienation of personal property. As the predominating purpose for which the trust attempted to be created was dependent upon the validity of the whole trust, which cannot be carried out, the trust as to the income must also fall. It is not permissible to eliminate language of a will so closely intermingled with the general plan the same was intended to cover, to make and thereby create a valid trust, where the clause of the will seeks to establish a trust which by its provisions is wholly invalid. (Central Trust Co. of N. Y. v. Egleston, 185 N. Y. 23.)

The suggestion that the income provided for Mary A. Swain having been paid to her down to the time of her death, and thereafter the trust having been administered according to the terms of the will, without opposition on the part of plaintiff, constituted the trust sought to be created a lawful trust for the surviving life beneficiaries, cannot be sustained. Such was not the expressed intent of the testator. The validity of the trust must be determined as of the time of the probate of the will, rather than after the death of one of the beneficiaries named therein. (Matter of Wilcox, 194 N. Y. 288.) The court is powerless to make valid a provision in a will which in its inception contravenes the statute, and which it had found as matter of law did violate the provisions of the statute.

The defendants cannot defeat this action upon the ground of

estoppel by reason of the proceedings in the Surrogate's Court upon the probate of the will and the decree on the final accounting in connection with the alleged acquiescence of plaintiff in the distribution of the income. Upon the probate of the will or upon the final accounting by the executors, the surrogate was not asked to, neither did he construe the provisions of the will of the testator. The only issues determined by the surrogate were, *first*, the capacity of the testator to make a will and that the same was properly executed; *secondly*, that the executors had properly accounted for all of the property of the testator.

The right of plaintiff to the amount of the trust fund as residuary legatee by reason of the invalidity of the fourth clause of the will was not an issue before the surrogate or determined by him in either of the proceedings. The decrees made by the surrogate did not involve the questions at issue in this action, and were not operative as an estoppel. (Rudd v. Cornell, 171 N. Y. 114.)

The decree upon the accounting is conclusive upon the plaintiff upon the distribution of the funds of the estate up to the time of the entry of the same, and equity requires that the income of the trust fund distributed by the trustee down to July 1st, immediately subsequent to the commencement of this action should remain unquestioned by him. The trial justice found as matter of fact "that in making the payments to Alanson C. Bailey and Mary A. Swain, the defendant trust company did not consult plaintiff and received no express directions from him to make said payments."

That the plaintiff did not earlier discover his legal rights and contest the validity of the fourth clause of the will by the terms of which the trust was sought to be established is not sufficient to defeat the action. Under the circumstances of this case the Statute of Limitations is not a bar to the maintenance of this action in favor of any of the defendants.

The trust company insists upon its right to hold the fund

and distribute a portion of the income to the respondent Alanson C. Bailey. The subject-matter of this action is to compel the trustee to account by reason of the invalidity of the fourth clause of the will. The trust being void the trustee holds the fund for the persons to whom the law or other provisions of the will give undisposed property to. (O'Connor v. Gifford, 117 N. Y. 275.)

As such trustee, the trust company cannot assert any claim adverse to the *cestui que trust* or deny his title. It does not hold the fund under any claim of ownership. As the attempted trust was invalid the funds constituting the same passed under the will to the plaintiff as residuary legatee. As against him the trust company has no claim or right to the fund. It will be protected in a payment of the fund to the plaintiff by the judgment of the court. Had it held the fund and accumulations for a period of eleven years, could it as trustee retain the same as against the beneficiaries by reason of the Statute of Limitations? That question is susceptible of but one reply. (Matter of Camp, 126 N. Y. 377; Zebley v. Farmers' L. & T. Co., 139 N. Y. 461; Perry on Trusts [6th ed.]), § 433.)

In favor of the infant defendants the Statute of Limitations is not a bar. Under the terms of the will they were not possessed of a vested interest in the attempted trust fund. They had merely a contingent interest in the same which might never mature into a vested estate.

The defendant Alanson C. Bailey cannot defeat the right of the plaintiff to an accounting by the trustee and a construction of the will by reason of the Statute of Limitations. The income received by him was paid to him by the trust company without consultation with or the direction of the plaintiff.

In Read v. Williams (125 N. Y. 560, 566) Judge ANDREWS writing for this court, referring to the jurisdiction of a court of equity to entertain an action in behalf of the next of kin of a testator for the construction of a will disposing of personal estate, where the disposition made by the testator was claimed

to be invalid, said: "It is true that in such cases the next of kin claim in hostility to the will, but the executors, in case the disposition made by the testator is invalid or cannot take effect, hold the personalty upon a resulting trust for those entitled under the Statute of Distributions, and thereby the jurisdiction to bring an equitable action for construction and to have the resulting trust declared by the court attaches as incident to the jurisdiction of equity over trusts. The Code of Civil Procedure (§ 1866) has extended the remedy so as to include suits for construction of devises in behalf of heirs claiming adversely to the will, and it would not be consistent with the spirit of this legislation to narrow the jurisdiction in cases of bequests of personalty."

Applying the principle of law stated in that case to the case at bar we conclude that the trust company holds the fund in controversy upon a resulting trust for the plaintiff as the residuary legatee under the will of the testator. The plaintiff seeks in this action to compel the trustee to account to him for that fund by reason of the invalidity of the fourth clause of the will. The plaintiff, beneficiary of such fund, as a continuing right to maintain such action so long as any portion of the fund or the accumulations thereof remain undisposed of and unaccounted for by the trustee. (*Miner v. Beekman*, 50 N. Y. 337; *De Forest v. Walters*, 153 N. Y. 229; *Lammer v. Stoddard*, 103 N. Y. 672.)

We, therefore, determine, *first*, that the fourth clause of the will was invalid and in contravention of the statute against perpetuities and the ownership and alienation of personal property; *second*, that the plaintiff herein as residuary legatee under the will of Daniel E. Bailey is entitled to the avails of the trust fund now in the hands of the defendant Buffalo Loan, Trust and Safe Deposit Company, together with any accumulations thereon from the first day of July subsequent to the commencement of this action, after the deduction of legal commissions to

which the trust company is entitled for the disposition of said fund; *third*, that the defendant Alanson C. Bailey is not entitled to any further payments under the will of Daniel E. Bailey, but is entitled to hold and retain the income paid to him down to July 1st, subsequent to the commencement of this action; *fourth*, that the plaintiff is not entitled to recover from Alanson C. Bailey or the representatives of Mary A. Swain any income from the trust fund paid under the will of Daniel E. Bailey to either of said parties prior to the first day of July subsequent to the commencement of this action; *fifth*, that the infant defendants had no vested right under the fourth clause of the will of Daniel E. Bailey.

The judgments of the Appellate Division and Trial Term should be reversed, and the case remanded to the Trial Term for a decision and judgment directed in accordance with this opinion, with costs to the plaintiff and the guardian *ad litem* in all courts, payable out of the fund.

WILLARD BARTLETT, Ch. J., CHASE, COLLIN, MILLER, CARDOZO and SEABURY, JJ., concur.

Judgment accordingly.

SUSAN E. HADCOX, Respondent, v. MARY R. CODY, Individually and as Executrix of JAMES A. CAREY, Deceased, et al., Appellants, Impleaded with Others.

(Court of Appeals, January, 1915.)

WILL—CONSTRUCTION OF PROVISION CREATING TRUST OF TESTATOR'S RESIDUARY ESTATE FOR BENEFIT OF HIS DAUGHTER FOR LIFE—DISPOSITION OF FUND UPON DEATH OF SURVIVOR OF DAUGHTERS.

Testator's will provided: "After all my lawful debts and funeral expenses are paid I give and bequeath unto my daughter Susan Emeline the use of Two Thousand Dollars during her natural life, the balance

of my property to be divided equally betwixt my two daughters (Susan Emeline and Mary Rosetta) during their natural lives and then to my legal descendants, if any there shall be, but if there should be none then to Theodore De Land or his children." Testator left two daughters, named in the will, his only heirs and next of kin, one of whom is plaintiff, the other defendant in this action for its construction. The plaintiff has never had a child. The defendant Mary R. Cody at the time of the death of her father had two children, her only living descendants, one of whom is dead, and the other of whom is defendant James Carey Cody, who is the only descendant now living of the testator other than the two daughters. Theodore De Land, named in the will, is living, and he has three children who are defendants herein. *Held*, that testator intended to dispose of all of his property by his will; that all of his property should be held until the death of his daughters and the survivor of them, and that at such time it shall become the absolute property of the legal descendants of the testator, if any there shall be, but if there should be none then to Theodore De Land or his children.

Hadcox v. Cody, 157 App. Div. 901, modified.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 12, 1913, modifying and affirming as modified a judgment entered upon the report of a referee in an action brought for an accounting and for the construction of the will of James A. Carey, deceased.

James A. Cary died April 18, 1890, leaving a will duly attested, which was thereafter duly probated and of which the following is a copy:

"I, James A. Carey of Deansville, county of Oneida and state of New York, being of sound mind and memory, do make, publish and declare this to be my last will and testament, viz.: After all my lawful debts and funeral expenses are paid I give and bequeath unto my daughter Susan Emeline the use of Two Thousand Dollars during her natural life, the balance of my property to be divided equally betwixt my two daughters (Susan Emeline and Mary Rosetta) during their natural lives and then to my legal descendants, if any there shall be, but if there should be none then to Theodore De Land or his children. And I

hereby constitute and appoint my two daughters executors of this my last will and testament and require them to give good and sufficient bonds for the faithful performance of their duty in relation to this instrument, and I hereby revoke all former wills by me made.

"In Witness Whereof I have hereunto subscribed my name and affixed my seal this 8th day of May in the year of our Lord one thousand eight hundred eighty-nine.

"JAMES A. CAREY [L. s.] "

James A. Carey did not leave a widow him surviving. He left surviving two daughters, his only heirs at law and next of kin, the plaintiff Susan E. Hadcox, and the defendant Mary R. Cody. The plaintiff has never had a child. The defendant Mary R. Cody at the time of the death of her father had two children, her only living descendants, one of whom died in 1900, and the other of whom is the defendant James Carey Cody. James Carey Cody is the only descendant now living of James A. Carey, deceased, other than his said two daughters. Theodore De Land, named in the will, is living, and he has three children who are defendants herein. The defendant Theodora De Land, an infant, appeared in the action by a guardian *ad litem* and submitted her interest to the protection of the court. The defendant Mary R. Cody duly qualified as executrix of said will, but the plaintiff did not qualify as an executrix.

Joseph Beal and Merchant B. Hall for appellants. It was the intention of the testator by his will, *first*, to give a left estate to each of his daughters, giving a preference to Mrs. Hadcox to the extent of the use of \$2,000; *second*, to make his posterity his residuary beneficiaries; *third*, to make a substitutionary gift to the De Lands to prevent failure to take under the will in case he should have no descendant. (L. 1909, ch. 52, § 240; Williams v. Jones, 166 N. Y. 522; Smith v. Bell, 6 Pet. 68; Mills v. Hudson, 140 N. Y. 99; Barnes v. Provoost, 4 Johns. 61;

Byrnes v. Stillwell, 103 N. Y. 453; Schouler on Wills, 530; Jarman on Wills, 168; Matter of Russell, 168 N. Y. 175; Stokes v. Weston, 142 N. Y. 433; Matter of Brown, 154 N. Y. 313; Connelly v. O'Brien, 166 N. Y. 406; Benson v. Corbin, 145 N. Y. 351.)

William Townsend for respondent. By "descendants" the testator meant to designate that indefinite and unascertained class of persons, heirs of his body, if any there should be, who survived the life estates. (Cons. Laws, ch. 13, § 98, subd. 7; Matter of Kimberly, 150 N. Y. 90; Moore v. Littel, 41 N. Y. 66; Heaton on Surrogates' Courts, § 920; Matter of Allen, 151 N. Y. 243; Hebbard v. Lese, 107 App. Div. 425; Matter of Seaman, 147 N. Y. 69; Campbell v. Stokes, 142 N. Y. 23; Matter of Curtis, 142 N. Y. 219; March v. March, 186 N. Y. 99.)

CHASE, J. — The judgment of the Special Term so far as it relates to the account of the executrix is affirmed by the Appellate Division. We have examined the record relating to the account and find no reason for changing the judgments entered so far as they adjudge, determine and settle the account of the executrix.

The fact of making a will raises a very strong presumption against an expectation or desire on the part of the testator of leaving a portion of his estate undisposed of by his will. (Schult v. Moll, 132 N. Y. 122, 127.) We think it was the intention of the testator to dispose of all of his property by his will and that he did not contemplate the possibility of dying intestate as to any of his estate. The gift to his daughters for life of the "balance of my [his] property" was intended to include all of his property except the use of two thousand dollars by his daughter Susan Emeline During her natural life. We concur, therefore, with the Appellate Division "that the prin-

cipal of the two thousand dollar fund, the life use of which is given to the plaintiff, passed subject to such life estate under the provisions of the will as a part of testator's residuary estate."

We do not agree with the Special Term and the Appellate Division in construing the life estates of the daughters in the balance of the testator's property as terminable at the death of the daughters severally. The gift is "during their [the daughters] natural lives and then to my [his] legal descendants." We think from the language used by the testator in his will that he intended to divide the balance of his property equally between his daughters for life with cross-remainders and upon the death of the survivor of the daughters *to the testator's legal descendants* as a class at the death of such survivor "if any there shall be, but if there should be none, then to Theodore De Land or his children." If the testator intended a vesting of his estate in his legal descendants at his death subject to the life estates, he must have known that in reasonable probability his daughters to whom the life estates were given would outlive him and become vested with his estate, for if both were living at his death they would be his legal descendants. In such case the daughters by the will would be given both the life estates and the remainder. This was clearly not the intention of the testator. When the intention of a testator is ascertained it will control the construction to be given to his will. (*Cammann v. Bailey*, 210 N. Y. 19.)

The testator refers in his will to *his legal descendants* "if any there should be" and not to the *legal descendants of his daughters or either of them*. If the principal of the estate did not vest in the testator's descendants at his death then, unless it was the intention of the testator to give to each of his daughters a life estate in an equal part of his residuary estate with cross-remainders, upon the death of one of the daughters the property theretofore held in trust for her would necessarily pass absolutely to the other daughter in whole or in part as the sole

or as one of the legal descendants of the testator. If the testator intended a vesting and distribution of the part of his estate held for the benefit of such daughter in severalty he must have known that one daughter in all reasonable probability would survive the other and that the share held in trust for the one first dying would, as we have said, pass absolutely to the survivor or to the surviving daughter and the descendants of the deceased daughter. (Decedent Estate Law, Cons. Laws, ch. 13, sections 82, 83.)

A careful study of the intention of the testator, as shown by his will, leads up to the conclusion that he intended to dispose of all of his property by his will; that all of his property should be held until the death of his daughters and the survivor of them, and that at such time it should become the absolute property of the legal descendants of the testator, "if any there shall be, but if there should be none then to Theodore De Land or his children." (Purdy v. Hayt, 92 N. Y. 446; Salter v. Drowne, 205 N. Y. 204.)

The judgment of the Appellate Division should be modified, as provided by this opinion, and as so modified affirmed, without costs to either party.

WILLARD BARTLETT, Ch. J., COLLIN, CUDDEBACK, MILLER and CARDOZO, JJ., concur; HISCOCK, J., absent.

Judgment accordingly.

Matter of the Probate of the Last Will and Testament of
EDWARD HALL, Deceased.

(*Surrogate's Court, Clinton County, April, 1915.*)

WILLS—WHAT QUESTIONS INVOLVED UPON PROBATE OF—EVIDENCE—SUBSCRIBING WITNESSES—RULE APPLICABLE TO ANCIENT DOCUMENTS—SATISFACTORY PROOF OF HANDWRITING*—CODE CIV. PRO., § 933.

Where no objections are filed to the probate of a will the only question involved is the sufficiency of the proof to establish the will.

Under section 933 of the Code of Civil Procedure, certificates of the death of each of the subscribing witnesses to a last will certified from the state department of health are competent evidence of the death of the persons named in the certificates in a proceeding to have the will admitted to probate.

The testimony of an attorney that about 1882 decedent and the proponent of the instrument offered for probate as decedent's last will showed it to him and decedent declared that it was his will and inquired if it was correctly drawn, and that thereupon the witness drew a similar will for said proponent in favor of decedent, was properly admitted in a proceeding instituted in 1915 for the probate of the will.

Under the rule applicable to ancient documents the subscribing witnesses to a will executed for more than thirty years and bearing a full and complete attestation clause are presumed to be dead, and where the signature and the handwriting of the subscribing witnesses have been satisfactorily proven there can be no objection to the probate of the will, even though the certificates of the death of the subscribing witnesses and the testimony of the attorney, all of which was received in evidence over objection, be not considered.

PROCEEDING upon the probate of a will.

Riley & Gordon, for proponent.

O. B. Brewster (Patrick J. Tierney, of counsel), for heir.

BOIRE, S. — This is a proceeding for the probate of the will of the late Edward Hall, who died July 14, 1914, survived only

* See Mills Surr., Vol. 1, p. 451; Vol. 10, p. 37.

by his widow and a brother. The widow presents for probate a will dated April 17, 1880, wherein she is named as the sole devisee and legatee as well as executrix. The brother of the deceased appeared in the proceeding and examined the witnesses offered by the proponent, took certain exceptions to the evidence introduced and at the close of the testimony made a motion to strike out part of the evidence received and also asked for the appointment of an administrator on the ground that there was no will. The brother, however, specifically avoided filing any objections. With the record in this state, I consider that there is no contest to the probate of the will, and the only question involved is as to the sufficiency of the proof to establish the will.

The instrument offered for probate purports to be witnessed by William H. Sisson and Amelia Sisson, neither of whom is produced in this proceeding, and the absence of the attesting witnesses has been the cause of the introduction of common-law proof for the purpose of establishing the will. This proof has met with the objection of the deceased's brother. Other evidence objected to consisted of two certificates of death, one of William H. Sisson and the other of Amelia Sisson, certified from the state department of health. The reception in evidence of these certificates was objected to, "On the ground that they were incompetent, not properly authenticated, immaterial, irrelevant, not properly connected with the deceased witnesses and not proper proof of death." A review of the evidence and the selection of the competent evidence seem necessary at this time in order to pass on the question presented. I think that the objections just mentioned were untenable. These certificates are made evidence by statute. (Code Civ. Pro., § 933.) The Public Health Law provides for the keeping of the records and I see no objection to the form of the certificates. A case directly in point is *Matter of Francis* (73 Misc. Rep. 148), in which Judge FOWLER admitted just such proof, apparently on the authority of *Keefe v. Supreme Council* (37 App. Div. 276). My own idea,

however, is that this evidence is competent and proper on another theory, one fairer to a contesting party and more in accord with the long established rules of evidence. It will be observed that these certificates were not offered to prove a fact directly in issue. The proponent offered them simply to prove the death of witnesses to the instrument and not in any way to establish the main point at issue, to wit, the *factum* of the will, so that the contested proofs were offered only for the purpose of excusing the proponent from the production of one class of evidence and to permit her to prove part of her case by secondary evidence. This evidence did not in any way prove the proponent's case. It simply permitted her to prove her case in a little different way than would ordinarily be required of her. In other words, it was a collateral and preliminary matter to the real case. For these reasons I consider that we may disregard the criticisms of Keefe v. Supreme Council and the apparently conflicting doctrine advanced in Davis v. Supreme Lodge (165 N. Y. 159), and in Buffalo Loan, T. & S. D. Co. v. Knight Templars (126 id. 450), as these cases all dealt with the competency of health statistics on questions directly in issue.

I think, also, that there was plenty of evidence to identify the deceased mentioned in the certificates with the witnesses, among other things, like initials, corresponding age, same occupation, etc. This is true, particularly in view of the fact that this is a collateral matter and no proof is offered in dispute of the facts alleged.

The next evidence strenuously objected to was the testimony of Smith M. Weed, an attorney at law, who was permitted to testify that about 1882 or 1883 the deceased and the proponent visited his office, showed him the will here offered for probate and the deceased then said that this instrument was his will and inquired if it was correctly drawn; that the witness thereupon drew a similar will for the proponent in favor of the deceased. This raises a very nice point relative to the prohibition of at-

torneys from testifying to communications to or by clients. The evidence was admitted on the theory that the communication was not confidential owing to the fact that two persons were present and that the present controversy is between the two clients, or rather between one client and the person representing the interest of the second client (if, in fact, they were both clients). (Whiting v. Barney, 30 N. Y. 330; Doheny v. Lacy, 168 id. 213, and cases therein cited.)

I am still inclined to believe that the evidence was properly admitted. Under the doctrine sustained in the cases just cited it seems clear that were this contest between the original clients over a disputed deed executed under the circumstances recited, there would seem to be no room for doubt as to the competency of the attorney's testimony and I can see no distinction between such a controversy and the one under consideration, where the heir is a party only through his deceased brother. Were this question in doubt, I am strongly of the opinion that the proponent would deserve the leniency of the law in view of the milder and more flexible rule governing the testimony of attorneys at the time the communication actually transpired, to wit, in 1882 or 1883, for, while I doubt that the proponent has any vested right to the benefit of the rules of evidence existing at the time this instrument was made, yet it would seem unjust to totally ignore the possibility that the parties may have been influenced by the then existing law in permitting the instrument to remain without additional evidentiary support.

I have discussed the foregoing questions because they are presented by the evidence offered and received in evidence. However, to my mind it is unnecessary in order to establish the validity of this will to look to any of the evidence objected to, as it seems to me that by totally ignoring this evidence the proponent has established a *prima facie* case for the probate of the will — and that is all that is necessary in an uncontested case.

The proof shows that the deceased was a civil engineer actively

engaged in his work at the time the will is dated and that the witnesses were an accountant cashier and his wife, temporarily residing at the same place at the time in question. The deceased and his wife, the proponent, have no children. The will comes from the custody of the widow who is also its sole beneficiary and executrix. There is nothing in the appearance of the instrument to arouse suspicion; it bears the marks of age and exhibits an honest face. It bears a full and complete attestation clause. The signature of the testator was proven satisfactorily. The instrument having passed muster on the score of (1) custody (the executrix and beneficiary was a proper custodian), (2) appearance and (3) age, to wit, more than thirty years; it would seem to me that under the rule applicable to ancient documents the witnesses are presumed to be dead and very little evidence, if any, in addition to that already mentioned is necessary to establish it as a will; but having proven the handwriting of the witnesses I can see no objection to the probate of the will, even though we should not consider any of the evidence objected to. (*Jackson v. Laroway*, 3 Johns. Cas. 283; *Clark v. Owens*, 18 N. Y. 434; *Fetherly v. Waggoner*, 11 Wend. 603; *Northrop v. Wright*, 24 Wend. 221; *Wilson v. Betts*, 4 Den. 201; *Burhans v. Blashan*, 3 Johns. 292; *Jackson v. Luquere*, 5 Cow. 221; *Wigm. Ev.*, § 1311, p. 2137.)

While a controversy exists between the various authorities above cited on some features of ancient documents they all are based firmly on the theory that a document thirty years old is presumed to be without living witnesses to its execution. This particular phase of the doctrine of ancient documents, so far as I know, has never been abridged by statute or even criticized in decisions and in my opinion it is now still the law, as it surely should be, since it is founded on the experience of centuries and the well-established average of the length of human life. The will is admitted to probate.

Probate decreed.

Matter of the Probate of a Paper Writing Purporting to be the
Last Will and Testament of THEODORE A. LORD, Deceased.

(*Surrogate's Court, Westchester County, April, 1915.*)

WILLS—PROBATE OF—OPENING OF DECREE OF PROBATE—CODE CIV. PRO.,
§ 2490(6).

Where on motion to open a decree of probate one claiming to be decedent's widow submits numerous affidavits in support of her claim that she married him in San Francisco in 1888, and the parties opposing the motion claim that decedent was not a party to any such alleged marriage and submit evidence that on the date thereof decedent was the husband of one to whom he had been married in 1869, and the so-called widow while admitting the earlier marriage claims that decedent between 1870 and 1875 divorced his first wife in California and that the records of said decree of divorce were destroyed in the fire caused by the San Francisco earthquake, and in substantiation of her claim submits the declarations of decedent to the effect that he had obtained such divorce and also the affidavit of the attorney who procured it, he stating that all the records in his office were destroyed in said fire, and it is conceded that the so-called widow was not served with a citation in the probate proceeding, the surrogate under section 2490(6) of the Code of Civil Procedure has power to open the decree admitting the will to probate.

If upon the opening of the decree of probate objections are filed and answers interposed attacking the validity of decedent's marriage to the so-called widow, the court as a preliminary proposition has the right to determine the question.

MOTION to open decree of probate.

Arthur D. Truax (Charles W. Sinnott, of counsel), in support of motion.

R. E. & A. J. Prime, for administratrix, *c. t. a.*

Robert L. Luce, for Elsie G. Hunsdon.

SAWYER, S. — Theodore A. Lord died on the 17th day of June, 1914, leaving a last will and testament which was duly

admitted to probate in the office of the surrogate of Westchester county on the 20th day of July, 1914.

This motion is made by one who styles herself Eugenie Ferrer Lord. She claims that she is the widow of decedent, Theodore A. Lord, and as such widow should have received notice of the proceedings for the probate of the will of the decedent pursuant to the provisions of section 2615 of the Code of Civil Procedure (old Code).

The so-called widow alleges that she married the decedent, Theodore A. Lord, in the city of San Francisco, Cal., on the 24th day of November, 1888. She submits numerous affidavits in support of this contention. On the other hand, the parties opposed to this motion claim that the decedent never was a party to any such marriage and submit evidence to the effect that on the date of the alleged marriage the said Theodore A. Lord was the husband of Julia Clinton Jones Lord, their marriage having been solemnized on or about the 12th day of October, 1869. The so-called widow, as a reply to the allegation of the prior marriage, admits the former marriage, but claims that the decedent, Theodore A. Lord, between the years 1870 and 1875 obtained a decree of absolute divorce from his first wife Julia Clinton Lord in the courts of the State of California and that the records of said decree of divorce were destroyed in the conflagration caused by the earthquake in San Francisco, Cal. She substantiates this by submitting declarations of the decedent showing that he had obtained such a divorce and also by affidavits from the attorney who procured the divorce, said attorney claiming that all of the records in his office were destroyed in the fire above mentioned.

Under section 2610 of the Code of Civil Procedure (old § 2615) the following persons must be cited upon a petition for probate: "(1) If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator. (2) If the will relates exclusively to personal property, the

husband and wife, if any, and all the next of kin of the testator. (3) If the will relates to both real and personal property, the husband or wife, if any, and all the heirs and all the next of kin of the testator. * * *

No citation was ever issued to the so-called widow of Theodore A. Lord in this proceeding. Assuming that she was the widow of Theodore A. Lord, there can be no question as to the right of the surrogate to open the decree of probate and allow her to intervene.

Under section 2490, subdivision 6, of the Code of Civil Procedure, the surrogate is given power: "To open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case, and in the same manner, as a court of record and of general jurisdiction exercises the same powers."

This provision is in substance the same as section 2481, subdivision 6, of the old Code.

As it is conceded that the so-called widow was never served with a citation in this proceeding, this would give the surrogate the right to open the decree on the grounds of "other sufficient cause." *Matter of Harlow*, 73 Hun, 433; *Matter of Donlon*, 66 id. 199; *Matter of Crumb*, 6 Dem. 478; *Matter of Lyon*, 26 N. Y. Supp. 469; *Matter of Odell*, 1 Misc. Rep. 390; *Matter of Thompson*, 41 id. 223.

I have carefully considered the voluminous affidavits submitted both in support and against this motion and have come to the conclusion that the so-called widow should be given a chance to offer proof in a court of record in substantiation of her alleged marriage. I will open the decree and give the so-called widow a chance to intervene in the probate proceeding, granting her an opportunity to examine witnesses, file objections, etc., the same as if she had been cited on the original probate.

The next question to be considered is one of procedure, as the will in this case was offered for probate prior to the new Surrogates' Practice Act, which went into effect September 1, 1914. The law in effect at the time of the offering of the will for probate will control. If objections are filed and answers interposed attacking the validity of the so-called marriage, then this court as a preliminary proposition will hear and determine the question of the alleged marriage. If this court determines that there was no marriage then the objections will be dismissed.

Courts are concerned only in hearing and determining the rights of those who have an interest in property where there may be a violation of some right. (Matter of Nelson, 89 Misc. Rep. 25.)

As to the right of this court to hear and determine as a preliminary proposition the question of this so-called marriage there can be no doubt. (Matter of Hamilton, 76 Hun, 200.)

Judge VAN BRUNT, who wrote the opinion, said as follows: " * * * The principal objection urged by the counsel for the appellant, which, however, was not taken during the progress of the trial before the surrogate, was that the court erred in trying the question as to the status of the appellant as the widow of the decedent before taking testimony as to the *factum* of the will.

" It is urged that the appellant was made a party to the proceeding by the petition of the executor for probate; and that by section 2528 of the Code it is provided that the appearance of a party against whom a citation has been issued has the same effect as the appearance of a defendant in an action brought in the Supreme Court. We think in the presentation and argument of this objection, which goes to the jurisdiction of the surrogate, that the learned counsel has overlooked the authority which is vested in the surrogate, and which is necessary in the performance of his duties; and that he has also sought to invest the appearance of a defendant in an action in the Supreme

Court with a sanctity to which it is not entitled. It is a very familiar rule in the conduct of a trial of cases, particularly those in the nature of equity proceedings, where there is a preliminary question as to the right of one of the parties either to bring the action or to intervene as a defendant, to try such question and to determine the status of the parties before attempting to pass upon the final rights in respect to which the action is brought. Such is the foundation of almost all interlocutory judgments in equity actions, except those entered upon demurrers.

“In actions for a partnership accounting, it is familiar practice where the partnership is denied, as to one of the parties, to first try the question of partnership before allowing such party claiming to be a partner to vex the court and the other party to the litigation with his presence in a controversy in which he may have no interest. So, in the case at bar, only those persons who are interested in the probate of this will had a right to contest the same. The provision of the statute is (if the will relates to both real and personal property, as in this case) that the husband or wife, if any, or the heirs or next of kin of the testator, and all persons in being who would take an interest in any portion of said personal property, and the executor or executors, trustee or trustees named or described in the will shall be cited. And it provides that any person, although not cited, who is named as a devisee, or legatee in the will propounded, or who is otherwise interested in sustaining or defeating the will, may appear and support or oppose the application. These provisions of the statute show that only those persons who are interested in the question as to whether the will shall be probated or not can be heard to support or oppose the application. And it seems to be a proposition which hardly needs a suggestion for its refutation, that one person cannot give another a standing in court for contesting the probate of a will by naming him in the petition as being that which he is

not. Any person designated in the will as executor, devisee or legatee, or any person interested in the estate, or a creditor of the decedent, may apply to have a will admitted to probate.

"Can it be that any one of these parties, by simply naming another party as an heir or next of kin, or a wife or husband, as the case may be, can give that person a status to contest the probate of a will in which he has not the slightest possible interest, because the relationship does not exist? Clearly not. As in respect to the other procedures of the Surrogate's Court, these incidental powers which are necessary for the fulfillment of the duties imposed upon him by statute are possessed by the surrogate, as was recognized in *The Matter of Peaslee* (73 Hun, 113). So in reference to the probate of a will, where the right to support or oppose such application depends upon interest, has the surrogate the right to determine the status of the party proposing to contest. Upon an accounting for the purpose of distribution of an estate, the surrogate has the power to construe the will so far as it affects his decree of distribution. This is an incidental power. He now has, by provision of the statute, the power upon the probate of a will to make such construction where then required. And to say that a party may come in and delay the proceeding without establishing any right or status seems to place such proceedings at the mercy of any interloper who may have the assurance to claim an interest, even though without the slightest foundation.

"It is urged that the Surrogate's Court has no equity jurisdiction. It is undoubtedly true. And it is further urged that, therefore, the court could not decree that this appellant was not the widow of the testator; and in support of this proposition our attention is called to the well-established principle that the Surrogate's Court has no power to annul or set aside, on the ground of fraud, a release executed by the parties interested in the estate to the executors thereof. But it has never been held that the Surrogate's Court had no power to try the question

as to whether any such alleged release existed or not. The Surrogate's Court would undoubtedly have the right to try the question of a release presented before him as to whether it had ever been signed, or whether it was a forgery; and it is a similar question which was being determined by the surrogate in reference to the alleged marriage with the testator. He was not making a decree annulling the marriage. He was simply determining the question as to whether the contestant had any status in his court by reason of her being the testator's widow. In order that this performance in New Jersey between Hamilton and the appellant should be a marriage, it was necessary that both parties should be free to contract, and, if either party was under a disability, although the parties went through the forms of a marriage, there was no marriage, and that is all that the surrogate attempted to determine.

"If the appellant, by virtue of an alleged martial relation, was seeking to enforce her rights in a court of law, those rights could be defeated by showing that no such relation existed, because, at the time of the attempted contract, of the disability of one of the parties. This has always been the rule, and the surrogate, in passing upon the status of this contestant, assumed no equity jurisdiction but was passing upon a legal question.

"It is further urged that in any event the legatee who filed the objection to the appearance of the appellant as a contestant of this will, being simply a defendant to this proceeding to probate the will, had no right to question the status of this contestant. The force of this objection we are unable to see. Any party interested had the right to bring this question to the attention of the surrogate, and in the orderly conduct of the proceeding ask him to pass upon it. The proceedings for the probate of the will did not belong to any of the parties, but belonged to the court. The court has a right to bring in other parties, to allow other parties to be heard, and to determine whether parties claiming to be heard have any status in the proceeding whether

any of the other parties object or not. It seems to be assumed by the appellant that the surrogate is a mere agent of the proponents of the will; that he has no powers of his own for the purpose of seeing that justice is done. This is contrary to the whole scope of the authority conferred upon the surrogate in the probate of wills. He is bound to see that the proceedings are regularly conducted, to hear those entitled to be heard, and to prevent contests of wills by persons who have no interest."

For other authorities to the same effect see *Matter of Bethune*, 4 Dem. 392; *Matter of McGarren*, 112 App. Div. 503; *Matter of Garner*, 59 Misc. Rep. 116.

Motion to open decree granted.

Motion granted.

Matter of Proving the Last Will and Testament of GEORGE R. SCHOBBER, Deceased, as a Will of Real and Personal Property.

(Surrogate's Court, Bronx County, April, 1915.)

**WILLS—VALIDITY AND EFFECT OF TEMPORARY DISPOSITION OF PERSONAL PROPERTY, HOW REGULATED—INCOMPETENTS MAY EXECUTE VALID WILL*
—WEIGHT OF TESTIMONY OF EXPERT WITNESSES AS TO MENTAL CONDITION.**

The validity and effect of a testamentary disposition of personal property is regulated by the laws of the state of which testator was a resident at the time of his death, and the validity and effect of such a disposition of real property within this state is regulated by the laws of this state without regard to testator's residence (*Decedent Estate Law*, section 47).

The testimony of expert witnesses as to testator's mental condition at a period some years prior to the date of the execution of the propounded document, and the probability of a continuance of such condition up to that date, is not entitled to more weight upon the question of the testator's alleged testamentary capacity at the time of the execution of the

* See note, Vol. XI, p. 518.

document than that of disinterested lay attesting witnesses who testify to testator's mental capacity immediately prior to and at that time.

It seems that even where a person is an adjudged incompetent he may still execute a valid last will and testament, if the same be executed during a lucid interval.

Before the provisions of a will can be said to be unnatural all the circumstances of its execution must be examined in order to ascertain what disposition the testator from his known views, feelings and intentions, would have been expected to make. It does not follow that a document is unnatural in its terms because the testator does not pay that regard to kindred which he might be expected to pay when the surrounding circumstances indicate a reason for his apparent lack of feeling towards those who would, under usual conditions, be the natural objects of his bounty.

PROCEEDING upon the probate of a will.

Wm. Winchester Hall, for petitioner.

Adolph and Henry Bloch, for contestant.

SCHULZ, S. — The petition states that the decedent was a resident of and died in the State of Pennsylvania possessed of certain personal property, to wit, debts owing to him by a resident of the county of Bronx and State of New York. These allegations not being controverted must be accepted as true (Code Civ. Pro., § 2546), and this court therefore has jurisdiction to entertain this proceeding. (Code Civ. Pro., § 2517.) The decedent also died seized of real estate situated in the State of New York. The disputed document is alleged to have been executed on the 5th day of June, 1914, and the decedent died on June 13, 1914. By its terms the residue of the estate remaining after the payment of his debts and funeral expenses is devised and bequeathed to a sister of the decedent, if she be living at the time of his decease, and, in the event of her death during his life, the same is devised and bequeathed to a niece of the decedent. As the alleged will contains testamentary dis-

positions of real property, the validity and effect of such testamentary dispositions are regulated by the laws of this State without regard to the residence of the decedent, and as it also contains testamentary dispositions of personalty the validity and effect of said testamentary dispositions are regulated by the laws of the State of Pennsylvania where the decedent was a resident at the time of his death. (Decedent Estate Law, § 47, Laws of 1909, chap. 18, constituting Consol. Laws, chap. 13.) It, therefore, becomes necessary in deciding the matter to consider not only the laws of our own State, but also those of the State of the decedent's residence.

From the petition it would appear that the decedent left him surviving a widow, two sisters, two nieces and a nephew. The widow filed objections in the usual form, but containing, in addition, an allegation that the heirs at law and next of kin, as set forth in the petition, are not the heirs at law and next of kin of the decedent, but that a person therein named and the widow are such heirs at law and next of kin and that the said person thus named should be made a party. The latter was thereupon brought into the proceeding by a supplemental citation issued to her; she thereafter appeared by counsel, and upon the hearing it was contended that she was a daughter of the decedent, being the issue of the marriage between him and his surviving widow. All of the parties are, therefore, before the court. The situation presented, regarding it from the standpoint of the contestant, is that of a testator who, by his alleged last will and testament, makes no provision for his wife and child.

I am satisfied from the evidence produced before me that the legal formalities of execution prescribed by the statutes of the State of New York and of the State of Pennsylvania, in which latter State the document is alleged to have been executed, were complied with. (Decedent Estate Law, *supra*, § 21; Purdon's Digest [13th ed.] tit. Wills.)

The objection to the effect that the subscription and publication of the disputed document was procured by fraud or undue influence is not sustained by the evidence. Mere opportunity to exercise undue influence does not of itself justify a conclusion that it was exercised. (*Cudney v. Cudney*, 68 N. Y. 148; *Post v. Mason*, 91 id. 539; *Logan's Estate*, 195 Penn. St. 282; *McNitt's Estate*, 229 id. 71, citing *Tyson's Estate*, 223 id. 596.) It cannot be presumed, but must be shown to have existed, either by direct evidence which from its nature is not often possible or by circumstances of such a character as to reasonably lead to the conclusion that it was present. (*Loder v. Whelpley*, 111 N. Y. 239; *Rollwagen v. Rollwagen*, 63 id. 504; *Matter of Richardson*, 137 App. Div. 103; *Caughey v. Bridenbaugh*, 208 Penn. St. 414; *Phillip's Estate*, 244 id. 44; *Matter of Campbell*, 136 N. Y. Supp. 1086, 1104.) The influence exerted by kindness to the testator or by feelings, on his part, of gratitude to or affection for the beneficiaries or those alleged to have brought about the testamentary disposition, is not undue influence. (*Children's Aid Society v. Loveridge*, 70 N. Y. 387; *Marx v. McGlynn*, 88 id. 358; *Matter of Mondorf*, 110 id. 450; *Englert v. Englert*, 198 Penn. St. 326; *Robinson v. Robinson*, 203 id. 400; *Caughey v. Bridenbaugh*, *supra*.) It imports coercion. (*Matter of Van Ness*, 78 Misc. Rep. 592, and cases cited.) It is "an affirmative assault on the validity of a will, and the burden of proof does not shift, but remains on the party who asserts its existence." (*Matter of Kindberg*, 207 N. Y. 220, 229, and cases cited.) While I have been unable to find a decision of the highest court of appellate jurisdiction in the State of Pennsylvania which lays down a rule as definite and broad as that enunciated in *Matter of Kindberg*, I believe that the general trend of decisions in that state justifies the conclusion that, under the facts and circumstances surrounding the execution of the disputed document in this case, the burden of proving undue influence was upon the contestant. (*Douglas Estate*,

162 Penn. St. 567; *Messner v. Elliott*, 184 id. 41.) No evidence tending to sustain this particular objection was introduced by the contestant so that the weight of evidence upon this proposition was clearly with the proponent.

There remains for consideration then only the question whether the alleged testator had testamentary capacity when he signed the document and published and declared it as required by law.

The burden of proving the competency of the alleged testator in this state rests upon the proponent. (Code Civ. Pro., § 2614; Decedent Estate Law, *supra*, §§ 10, 15; *Matter of Goodwin*, 95 App. Div. 183; *Matter of Schreiber*, 112 id. 495; *Matter of Lissauer*, 5 N. Y. Supp. 260; *Matter of Gedney*, 142 id. 157; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Matter of Cottrell*, 95 id. 329, *336; *Matter of Martin*, 98 id. 193, 196.) This being the most burdensome rule of law that can be imposed upon the proponent on the issue of testamentary capacity, it is unnecessary to discuss the law of Pennsylvania on this subject, unless the conclusion is arrived at that the proponent has failed to sustain the burden, required by the laws of this state.

The fact that the testator failed to provide for his wife and child might lay the instrument open to the criticism that it is unnatural in its terms, but in my opinion the fact that such provision was not made does not of necessity lead to this conclusion. The testimony shows that the decedent left his wife, under circumstances to which reference will hereafter be made, on the 17th of July, 1911, and journeyed from Stony Brook, where they were then residing, to the city of Philadelphia, where he took up his abode with one of his sisters; that he remained there for a period of about ten months to one year, and then went to live with his other sister, the alleged beneficiary, with whom he resided up to the time of his death. At the time that he left his wife he had quarreled with her and never saw her again, to confer with her, so far as the evidence discloses,

up to the time of his death. After the separation a settlement was made by which the property they held either jointly or severally was divided between them. That the estrangement between husband and wife took place because of fault on his part, as testified to by the contestant, is not material to the issue. The conceded facts are that there was such an estrangement and a subsequent division of the property of husband and wife, and whatever may have been the cause thereof, this furnishes an explanation and a reason for the failure of the decedent to make a provision in favor of his wife. It further appears that the daughter who survived him was not brought up by him and his wife, but spent her childhood and a part of her youth with a family in Philadelphia by whose family name she was known and, so far as she could recollect, had never seen her father until she was twenty-seven years of age. She also states that she first remembers seeing her mother when she, the daughter, was eighteen years old and never saw her again until she was twenty-seven years of age. In the years 1903 and 1904 she resided with her father and mother at Stony Brook, but with the exception of that period, seems not to have lived with either of them. During the time that she resided with her parents, as stated, it would appear from letters in evidence and from other testimony that the relations existing between her and the decedent were most pleasant. It is difficult, however, to assume that under the circumstances above detailed there existed between her and her parents that intimate personal relationship and dependence which a closer association between them during her childhood and youth would have tended to foster. She is not to be blamed for this; on the contrary, she merits sympathy, and yet it weakens the charge that the document which contains no provisions for her is unnatural in its terms. It is not for the surrogate to speculate why no provision for her was made, nor to declare the instrument invalid as the will of the decedent because the court may think that the decedent did not pay due

regard to the claims of kindred. He was disposing of his property and had a right to dispose of it as it pleased him, and so long as he observed the formalities of execution required by law, was of sufficient mental capacity to do so and free from undue influence, fraud and restraint, his wishes must be respected and his testamentary disposition given effect. (*Dobie v. Armstrong*, 160 N. Y. 584, 593; *Smith v. Keller*, 205 id. 39; *Cudney*, 68 id. 148; *Logan's Estate*, 195 Penn. St. 282; *Morgan's Estate*, 219 id. 355.) During the last years of his life he was very fond of the niece mentioned in the propounded document and lived with the aged sister who is the beneficiary in the alleged will. Considering all of the facts to which reference has thus been briefly made, it does not appear to me that the alleged disposition which he made of his property was under the circumstances such an unusual and unnatural testamentary disposition as to arouse a suspicion that the testator was not of sound mind.

The testimony of the two subscribing witnesses would tend to show that the testator at the time of the execution of the will was of sound mind, memory and understanding. This appears clearly from the testimony of the attorney who attended at the execution of the will. He says that he was instructed to draw a will of the decedent, and given the terms thereof by the husband of the niece named in the propounded document; that he prepared the instrument as instructed by him and then called upon the decedent, but, before showing it to him, asked him to state the terms of the will which he wished to execute and the same were then detailed to him and were as the niece's husband had stated them to be; that this document, however, contained no provision for the niece at all and that at the time of its execution the decedent stated that he wished a change made, namely, to have the name of the niece inserted as a beneficiary, to take in the event of the death of his sister during the decedent's life. It will be observed that the terms of the will, as stated to the draftsman by the husband of the aforesaid niece,

contained no provision for the latter's benefit. The attorney thereupon permitted the alleged testator to execute the instrument which he had drawn, but stated that he would redraw the same and insert the name of the niece at his request, and that thereafter he did so and that the latter document was executed and is the one now before the court for consideration. Without detailing his testimony further, it is to the effect that the testator at the time of the execution of the first document and of the document now propounded for probate was fully conversant with his affairs and competent to execute a last will and testament under the laws of the state of New York and of Pennsylvania. The testimony of the other subscribing witness is also to the effect that the testator was fully competent at the time of the execution of the instrument in question.

A number of witnesses were produced by the contestant, some of whom testified to acts and conversations of the decedent which they say impressed them as being irrational. None of the incidents which they narrate were at or near the date of the execution of the will and they are of such a character as to be as compatible with rationality as with irrationality. Other witnesses also called by the contestant give testimony which tends to show that the decedent, at the times they saw him, was rational. I do not consider the testimony tending to show irrationality, and above referred to, of great weight as against the testimony of the subscribing witnesses showing his condition upon the day when the document was executed. The fact that the decedent may have been eccentric, slovenly in dress and given to peculiarities of speech and manner are not sufficient to disqualify him from making a testamentary disposition of his property. (*Hartwell v. McMaster*, 4 Redf. 389; *Matter of Murphy*, 41 App. Div. 153; *Schouler Wills & Adm.* § 149; *Morgan's Estate*, 219 Penn. St. 355.)

There were two physicians called by the contestants, however, whose testimony merits more careful consideration.

It appears that these two witnesses, in the year 1911, were commissioners in lunacy, and in June or July of that year attended at the home of the decedent and examined him as to his mental condition. Upon the first of such examinations one of them testified that he refused to sign a lunacy complaint because he thought that the decedent might be taken care of without being committed. About two weeks later another examination was had at which the two physicians who testified were accompanied by a third physician. The conclusion arrived at by the witnesses was that the decedent was then suffering from progressive incurable delusional insanity. Some evidence given by them and by the contestant tended to show that steps were taken to have the decedent committed to an insane asylum, but neither an adjudication of insanity nor an order of commitment has been offered in evidence. One of the physicians on cross-examination testified that it was barely possible that the decedent could have had lucid intervals and also that it was barely possible for him to recover from his ailment sufficiently to attend to his affairs.

The testimony of these physicians as to the condition of the decedent in June or July, 1911, is not conclusive as to his condition in June, 1914, when the document under consideration is alleged to have been executed (Matter of Kiedaisch, 12 N. Y. Supp. 255, 260; McNitt's Estate, 229 Penn. St. 71), and I consider the testimony of the subscribing witnesses of greater weight. Even if there had been an adjudication of insanity and an order for a commitment in the year 1911, still I believe that under the authorities these facts would only have been *prima facie* evidence of incompetency and could be rebutted by proof of the execution of the disputed document during a lucid interval. (Wadsworth v. Sharpsteen, 8 N. Y. 388, 399; Jarman Wills [6th ed.], *37; Lewis v. Jones, 50 Barb. 645; Matter of Coc, 47 App. Div. 177; Harden v. Hays, 9 Penn. St. 151; Titlow v. Titlow, 54 id. 216; Schouler Wills & Adm., § 81.)

After the second visit of two of the physicians, it appears that the contestant advised the decedent that some one was coming to take him to an asylum and her testimony is that, notwithstanding the fact that the physicians had arrived at the conclusion that the decedent was insane, she nevertheless gave him thirty dollars, so that he could leave before he was taken away. Eight or nine months after the time the objectant claims to have ascertained that this decedent was insane, she accepted the fruits of a settlement made on her behalf with this alleged lunatic whereby she received a deed from him of his share of some real estate and an assignment of his interest in a mortgage and assigned to him her interest in two mortgages. It is difficult to reconcile such action with a belief on her part that at that time the decedent whose deed and assignment she accepted was insane. The evidence shows that between the time when he left his wife in 1911 and the time of his death in 1914, he made frequent trips from Philadelphia to New York, sometimes alone, sometimes in company with the niece mentioned in his will, and some of the witnesses for the contestant who saw him in New York when he was on one of his trips to the city in the year 1913 had no criticism to make of his conversation and demeanor, except that he appeared to have been drinking and was nervous.

Upon all of the evidence in this proceeding I am of the opinion that the proponent has fairly sustained the burden which is upon him on the issue of testamentary capacity. I accordingly conclude that the propounded document is the last will and testament of the decedent duly executed as provided by the laws of Pennsylvania and of this state; that its execution was not procured by fraud or undue influence, and that the decedent at the time of execution was of sound and disposing mind and memory, free from restraint and capable of executing a will valid to pass real and personal property.

The document will, therefore, be admitted to probate.

Probate granted.

Matter of the Application for Letters of Administration upon the Estate of ROBERT GRECO, Deceased.

(Surrogate's Court, Bronx County, April, 1915.)

EXECUTORS AND ADMINISTRATORS—APPLICATION FOR LETTERS OF ADMINISTRATION—WHEN APPLICATION DISMISSED.

On an application for letters of administration made on the petition of one alleging that he is a surviving son of decedent, to which objections were filed by the widow of intestate alleging that the petitioner is not a son of decedent, held, that as the petitioner had not sustained the burden of proving that he is one of the persons entitled to apply for letters of administration the application must be dismissed.

APPLICATION for letters of administration.

Gustave Frey, for petitioner.

William C. Stone, for respondent.

SCHULZ, S. — The petitioner applied for letters of administration upon the goods, chattels and credits of the decedent, alleging that the latter left him surviving as his only heirs at law and next of kin a widow and the petitioner, his son. The widow having a prior right to letters of administration (Code Civ. Pro., § 2588), the petition properly prayed for the issuance of a citation to her to show cause why such letters should not be granted to the petitioner. (Code Civ. Pro., § 2590.) Upon the return of the citation, the widow appeared by counsel and filed objections in which she set up her prior right to letters of administration on the decedent's estate, and alleged that the petitioner is not the son of the decedent; but that she, the widow, is the sole next of kin of the deceased; that all debts have been paid; that the issuance of letters of administration is unnecessary, and that the value of the estate does not exceed \$500.

Section 2588 of the Code of Civil Procedure above cited sets forth the persons entitled to letters of administration and also prescribes the order in which such letters of administration shall be granted. If, however, the person having a prior right and being competent refuses to accept the letters, they may be granted to one whose right is subsequent to that of the person refusing. The respondent, however, raises a question which involves the right of the petitioner, not only to serve, but also to inaugurate the proceeding.

The petitioner applies, not as a creditor, but as a person interested in the estate of the decedent by reason of the fact that he is the latter's son. If, therefore, he is not the son of the decedent, it follows that under the allegations of his petition he is not one of the persons who may apply for letters. The petition sets forth facts which authorized the issuance of the citation and the surrogate had a right to assume that they were true and to issue process accordingly. Code Civ. Pro., § 2546. Now, however, the allegation of kinship in the petition is controverted by answer, objection and proof and the application must be denied, unless the court from the evidence can find that the allegations of the petition are true.

The burden of proving that the petitioner is one of the persons entitled to apply for and receive letters of administration is upon the petitioner. He must bring himself within the provisions of the Code sections above cited before the court can entertain his application or grant the relief prayed for. It appears from the testimony, and is undisputed, that the petitioner from his earliest recollections was always treated as a son by the decedent and the respondent; that he bore their family name; was called, and referred to by them in conversation with others as their son; addressed them as a child does its parents and lived with them as a member of their family.

Upon this testimony I should unhesitatingly find that the petitioner was a son of the decedent and respondent, but evi-

dence has been introduced explaining these undisputed facts. The respondent testifies positively that the petitioner is not her son. This testimony was objected to and a motion made to strike it out, on the ground that it was in violation of the provisions of the Code of Civil Procedure, section 829. I am of the opinion, however, that the testimony was not prohibited by the section cited. In addition to her own testimony, however, she showed by the testimony of other persons, some of whom are entirely disinterested, so far as the evidence discloses, that the decedent stated to them that he had obtained the petitioner from a home in Brooklyn. One of the witnesses for the contestant who testified to that effect was a cousin of the decedent, Frank Greco. He was examined as to conversations had with the decedent and was allowed to testify thereto, over the objection of the petitioner, who claimed that the witness was an interested party and that his testimony was barred by the Code of Civil Procedure, section 829. The witness would have no interest in the estate of the decedent, which consists of personalty only, under the laws governing the distribution of property in case of intestacy, unless his father predeceased the decedent. (Decedent Estate Law, § 98, subd. 3, being Laws of 1909, chap. 18, constituting Consol. Laws, chap. 13.) There is no evidence to show that such is the case. Counsel for the contestant, however, did not contend that the father of the witness was still alive, but urged only that the witness had no interest in the estate of the decedent because the estate did not exceed the sum of \$2,000, and he could have no interest unless the estate exceeded the sum of \$4,000. I permitted this testimony to be given, stating that I would pass upon its competency when I decided the matter. From the testimony before me I am unable to say whether the party is interested or not and hence I believe that the testimony was competent. I will state, however, that I have not regarded his testimony in deciding this controversy, as there is sufficient evidence in my opinion to

justify the conclusion which I reach without the testimony of this witness which, even if not in violation of section 829 of the Code, must nevertheless be considered in the light of his friendly relations with the respondent.

It also appears that in the year 1891 the respondent took the petitioner to a church to be baptized, and there was offered in evidence the church record of such baptism, a translation thereof being as follows:

"July 21st, 1891. I the undersigned, have baptized Claudium, born about 1885. From a home in Brooklyn. God Parents were Joseph Bianchi and Carmela Saraceni. Signed Jo. G. Bampini."

In the margin of the record book, alongside of the above, the following appeared, "Adopted (but not according to the civil law) by Raparato Greco and Carmela Cerbone, of New York."

The respondent objected to the introduction of this record, but I believe that it is competent evidence upon a question of pedigree. (Jackson v. King, 5 Cow. 237; Layton v. Kraft, 111 App. Div. 842, 846; Hartshorn v. Metropolitan L. I. Co., 55 id. 471; Wigm. Ev., §§ 1642, 1643.) The record was inscribed upon the register as the result of statements made by the respondent. These statements and the record were both made over twenty-three years ago, *ante litem motam*, and I have considered the latter of great weight in deciding whether her testimony, given at this time, is true. It might be argued that at this time there is a temptation for the respondent to deny that there was any relationship between the decedent and the petitioner because the respondent's share in the estate of the decedent would be seriously affected thereby, but such a temptation did not exist when the record was made. The respondent does not impress me as a woman who would deny her own son, to get a larger share of her husband's, at best, small estate, and examining her testimony now with the record above referred to, made twenty-three years ago, and the testimony of the other witnesses

produced by her, I cannot escape the conviction that the petitioner is not the son of the decedent and the respondent.

Counsel for the respondent has ably argued in his brief that there is a presumption of legitimacy, and such is undoubtedly the case. The question of legitimacy, however, does not enter into this controversy. The law presumes that the petitioner is a legitimate child, and there is absolutely nothing before me which would justify a finding to the contrary, nor is there any claim made that the petitioner is illegitimate. The law, however, does not indulge in any presumption or speculation as to who are the father and mother of the petitioner.

With all of the testimony before me I cannot find that the petitioner has sustained the burden which I believe is upon him to show that he is the son of this decedent and his petition must, therefore, be dismissed. In arriving at this conclusion I desire to make it clear that it in no way reflects upon the petitioner. From all of the circumstances surrounding his childhood and early youth he was justified in believing that the decedent and the respondent were his parents. For that reason no costs are imposed.

Decreed accordingly.

Matter of the Estate of KALIL FREIJE, Deceased.

(*Surrogate's Court, New York County, April, 1915.*)

EXECUTORS AND ADMINISTRATORS—WHO CITED TO ATTEND JUDICIAL SETTLEMENT—PRESENTATION OF CLAIMS.

A creditor of a decedent who not having presented his claim assigns it before the account of the administratrix is filed need not be cited to attend the judicial settlement of her account.

PROCEEDING upon the settlement of the accounts of an administrator.

Adolphus D. Pape, for petitioner.

Strouse & Strauss, for M. & C. Mayer.

Warren C. Fielding, special guardian.

FOWLER, S. — The question which arises upon the settlement of the decree presented by the administratrix is whether creditors who did not present their claims for admission or rejection, but who assigned them to another person before the account of the administratrix was filed, should be cited to attend the settlement of the account. Section 2730 of the Code of Civil Procedure provides that upon the judicial settlement of the account of an executor or administrator all creditors or persons claiming to be creditors of the decedent, except such as by vouchers filed with the account appear to have been paid, must be cited. Subdivision 3 of section 2768 of the Code of Civil Procedure defines creditor as including every person having a claim or demand upon which a judgment for a sum of money could be recovered in an action. A person who has assigned his claim against a decedent cannot after such assignment recover judgment upon the claim, as an action upon such claim could only be brought in the name of the real party in interest, namely, the assignee. (Code Civ. Pro., § 449.) Therefore the assignor of such a claim is not a creditor of the estate and need not be cited to attend the judicial settlement of the account of the legal representative of the decedent. Costs taxed and decree signed.

Decreed accordingly.

Matter of the Estate of HENRY BELDEN, Deceased.

(Surrogate's Court, New York County, April, 1915.)

EXECUTORS AND ADMINISTRATORS—PROCEEDING TO COMPEL PAYMENT OF CLAIM—DETERMINATION AS TO PRIORITY OF JUDGMENT CREDITORS—CODE CIV. PRO., § 2687.

A proceeding to compel payment of a claim instituted on the petition of one who claims an interest through a judgment creditor of the decedent is governed by section 2687 of the Code of Civil Procedure.

A contest as to priority between some of the judgment creditors of a decedent can only be properly determined in an accounting proceeding in which all interested parties are before the court, and while such a proceeding is pending a petition to compel payment of a claim will be dismissed, but without prejudice to the enforcement of any rights of the petitioner in any other proceeding or action.

PROCEEDING to compel the payment of a claim.

Brush & Crawford (John J. Crawford, of counsel), for petitioner.

Charles L. Craig, for administrator.

Henry W. Eaton (Earl A. Darr, of counsel), for claimants Phillips & Avery.

Murtha & Hanson, for Marion Hansen, etc.

Charles W. Leeman, for executors, etc., of Florian Groshean, deceased.

FOWLER, S. — This proceeding to compel payment of a claim was instituted on the petition of a person who claims an interest through a judgment creditor of the decedent, and is governed by section 2687 of the Code of Civil Procedure.

It is conceded that there are not sufficient funds in the estate to pay all the debts. Many creditors have appeared in this proceeding, and there is a contest as to priority between some of the judgment creditors. I am of opinion that these questions can only be properly decided in an accounting proceeding in which all parties interested are before the court, rather than in a proceeding where only some of the creditors and none of the legatees are parties.

There is now pending in this court an accounting proceeding in this estate. If it appears in the pending accounting proceeding "that there is a surplus attributable to creditors or persons interested" (Code Civ. Pro., § 2728), a supplemental citation may issue to all parties interested in the estate for a final and conclusive adjudication concerning the rights of every one interested in the estate. Such a final decree would necessarily dispose of the very questions raised in this proceeding. I will, therefore, dismiss the petition, without prejudice, however, to the enforcement of any rights of the petitioner in any other proceeding or action.

Application dismissed.

Matter of the Estate of JOSEPH HORWITZ, Deceased.

(*Surrogate's Court, New York County, April, 1915.*)

EXECUTORS AND ADMINISTRATORS—INVESTMENT OF TRUST FUNDS—VIOLATION OF EXPRESS TERMS OF WILL—INVESTMENT IN REAL ESTATE—ACCOUNTING.

In the absence of special authority in the will an executor may invest trust funds only in United States or state bonds, in loans on real estate and in the obligations of a city of this state issued pursuant to law.

Where an executor in violation of the express terms of the will invests trust funds in the real estate of his wife, the account of his administratrix will be surcharged with the sum so invested, with interest.

PROCEEDING upon the compulsory accounting of administrators.

Leonard Klein, for contestant.

Emanuel Van Dermoot, for petitioner.

FOWLER, S. — This is a compulsory accounting by the administratrix of Julius Horwitz, the deceased executor of Joseph Horwitz. Objections were filed to the account, but upon the hearing all were withdrawn with the exception of two which have to do with the alleged improper investment of \$12,665.43 by the deceased executor.

The will of testator bequeathed to the executor the sum of \$25,000 in trust for testator's wife, which sum was directed to be invested in first mortgages on real estate in New York county, and the income therefrom to be paid to the *cestui que trust* during her life. The remainder over upon her death was to become part of the residuary estate.

The trust created by the will of testator was administered by the executor for the benefit of the testator's wife until her death in February, 1909. After her death the executor distributed to the residuary legatees part of the money due them, the last payment having been made November 19, 1909.

In May, 1908, the accounting administratrix conveyed certain premises which she owned to her husband as executor of Joseph Horwitz, for the nominal consideration of one dollar. The account discloses that the deceased executor invested in all in these premises the sum of \$12,665.43. In the absence of special authority in the will, an executor may invest only in United States or State bonds, in loans on real estate and in the obligations of a city of New York State issued pursuant to law. (Laws of 1897, chap. 417, § 9; *King v. Talbot*, 40 N. Y. 76.)

The investment by the executor in the real estate owned by his

wife was in violation of the express terms of the will. The accounting administratrix will, therefore, be surcharged with the sum of \$12,665.43 (Matter of Fithian, 44 Hun, 457), and with interest on that sum at the rate paid by savings banks from the 19th of November, 1909.

Decreed accordingly.

Matter of the Estate of JAMES A. DUFFY, Deceased.

(*Surrogate's Court, New York County, April, 1915.*)

WILLS—DISPOSITION OF REMAINDER OF ESTATE—WHEN GIFT OF REMAINDER VESTS—INTENTION OF TESTATOR—WHO ENTITLED TO ENTIRE REMAINDER.

Where a testator, in disposing of the remainder of his estate after a life estate therein to a sister, directed the conveyance of one-half of his property to a niece, the payment of a certain sum to another sister, and the residue to still another sister to be conveyed at her death to her two sons and a daughter, the gift of the remainder of testator's estate was future and contingent and did not vest until the death of the life tenant.

Where by the same paragraph of the will disposing of the residue it was provided that should any of testator's sisters, nieces or nephews die before the life tenant of the whole estate the property should be divided *pro rata* among the persons mentioned, testator's evident intention was to confine the distribution of the remainder among such of those mentioned in the will as were living at the death of the life tenant, and one of testator's nephews who was the only person mentioned in the will who survived the life tenant of the entire estate was entitled to the remainder.

APPLICATION for the construction of a will.

Michael J. Scanlan, for John Brady and Alice McDonald, administratrix.

Edo E. Mercelis, for respondents.

Geller, Rolston & Horan, for substituted trustee.

Thomas Moore Simonton, for Josephine Marie Kendall et al.

FOWLER, S. — The substituted trustee has filed an account of its proceedings and asks the court to construe the will of testator so that the fund held by it may be distributed among the persons entitled thereto. The will reads as follows:

"I, James A. Duffy, do will and bequeath to my sister, Ellen C. Duffy (after paying my funeral expenses, which I desire to be inexpensive), all my property and effects. I hereby appoint Mr. Edgar S. Hicks, of Brooklyn, and Mr. John Gaynor, of New York the executors of this will, with instructions to convert my effects in the best manner their judgment will dictate and to invest it safely at interest for the sole benefit of the said Ellen C. Duffy.

"In the event of the death of the said Ellen C. Duffy before the death of my niece, Ellen Brady, or my sisters, Alicia and Ann, or my nephews, Peter J. and John Brady, I will that one-half of the above property be conveyed to my niece, Ellen Brady, one thousand dollars to my sister Ann, and the balance or residue to my sister Alicia, to be conveyed at her death to her children (Peter, John and Mary). Should either of the above sisters or nieces and nephews die before the death of my sister Ellen, it is my will that the property be divided *pro rata* on the above basis between the persons above mentioned."

Ellen C. Duffy, the sister of the testator, died on the 24th of February, 1914. All the persons mentioned in the will predeceased her, except John Brady, the son of testator's sister Alicia. That the will created a trust of all of testator's property for the benefit of Ellen C. Duffy during her life was determined by this court when it appointed the Farmers' Loan and Trust Company as substituted trustee in place of Edgar S. Hicks. (Smith v. Central Trust Co., 154 N. Y. 333.) The question now to be determined is, Who is entitled to the remainder after the life estate of Ellen C. Duffy? The will

was evidently drawn by a person unacquainted with the use of technical legal termn. While it is evident that the testator intended to give to Ellen C. Duffy a life estate in his entire estate, his intention as to the disposition of the remainder is not free from doubt. It is, therefore, necessary to have recourse to those rules of construction recognized by the courts as effective aids in the interpretation of wills which do not clearly express the meaning of the testator. One of those rules is that when the only words of gift are found in the direction to divide or pay at a future time, the gift is contingent and not vested. Applying this rule to the matter under consideration, it is apparent that the testator did not use words of direct gift in disposing of the remainder after the life estate of his sister, Ellen C. Duffy, for he directs that the remainder shall be conveyed to certain persons upon her death. The gift to those persons, therefore, was future and contingent, and did not vest until the death of the life tenant. (*Matter of Baer*, 147 N. Y. 348; *Matter of Crane*, 164 id. 71; *Schlereth v. Schlereth*, 173 id. 444; *Salter v. Drowne*, 205 id. 204.

The right of the remaindermen to take under the first sentence of the third paragraph of the will was dependent upon their surviving the life tenant. As all of them except John Brady, predeceased the life tenant, their next of kin are not entitled to any part of the estate left by the testator.

There remains to be considered the disposition intended by the testator in the last sentence of the third paragraph of his will. This sentence is involved and its meaning indefinite. It appears to me, however, that the testator intended by the words used in that sentence to indicate that if his niece, Ellen Brady, died before the life tenant, her share should be divided between the testator's sisters, Ann and Alicia, in the proportion which the value of the share which he had given to Ann bore to the value of the share he had given to Alicia. In the event of the death of any of the other remaindermen mentioned in

the will the same principle was to apply in determining the share which the survivors would take. He intended to confine the distribution of the remainder to those of the persons mentioned in the will who were living at the termination of the life estate of his sister, Ellen C. Duffy. Ellen Brady and the testator's sisters, Ann and Alicia, predeceased the life tenant. Alicia's children, Peter and Mary, also predeceased the life tenant. The only one mentioned in the will who survived the life tenant and who, therefore, became entitled to the remainder was John Brady. As he is the only survivor, there is no need to apply the *pro rata* rule of distribution mentioned by the testator. I will, therefore, hold that John Brady, the nephew of the testator, is entitled to the property now held by the trustee for distribution. Tax costs and settle decree on notice.

Decreed accordingly.

Matter of the Estate of MARGARET M. ADAMS, Deceased.

(*Surrogate's Court, New York County, April, 1915.*)

WILLS—CONSTRUCTION OF BEQUESTS OF PERSONAL PROPERTY—CORPORATIONS—WHAT PASSES UNDER BEQUEST OF CERTAIN SHARES OF STOCK.

A bequest of "my one hundred and sixty-six shares of St. Jo Lead Mining Company" and "thirty-three shares of Cattle Co." is a specific bequest and the will in its relation thereto must be construed as of the date of its execution.

When testatrix made her will she was the owner of 166 shares of mining stock and 33 shares of the stock of a cattle company. At a reorganization of both companies she received 16 shares of mining stock in exchange for her holdings in the cattle company. Thereafter, because of her ownership of the original 166 shares she received 472 shares in stock dividends all of which resulted from the distribution of the surplus accumulated by the mining company, and at the time of her death she was the owner of 654 shares of the mining stock. Held, that they all passed under the bequest of "my 166 shares," etc.

PROCEEDING upon the judicial settlement of the accounts of executors.

William R. Brinckerhoff, for petitioners.

Steele & Otis (Harold Otis, of counsel), for Rosalie Fanshawe and Margaret M. Clarke.

Frank B. Washburn, special guardian.

FOWLER, S.—The executors of decedent's estate have filed their account, and they ask the court to construe a certain clause of the will so that proper distribution of the estate may be made among the legatees.

After appointing her son to succeed her as trustee of a trust fund created by the will of her mother for the benefit of Rosalie Fanshawe and Margaret McGregor Clarke, and directing that he pay the income to them in equal shares, the testatrix provided:

"To this I wish added my one hundred and sixty-six shares of 'St. Jo. Lead Mining Company' and thirty-three shares of 'Cattle Co.' to make up to them the money their father borrowed from their grandmother which they would have had, and to keep my promise to their grandmother that they should not lose anything."

The will was executed on November 26, 1900. At that time the testatrix was the owner of 166 shares of stock of the St. Joseph Lead Mining Company and 33 shares of stock of the Bonne Terre Farming and Cattle Company. Subsequently there was a reorganization of these companies and the testatrix received 16 shares of stock of the St. Joseph Lead Mining Company in exchange for her 33 shares of stock in the Bonne Terre Farming and Cattle Company. After the execution of the will and prior to the date of decedent's death, the

St. Joseph Lead Mining Company declared stock dividends so as to provide for the distribution among its stockholders of the surplus which had been accumulated by the company. The testatrix, because of her ownership of the original 166 shares of stock, received 472 shares in stock dividends, so that at the time of her death in 1913 she owned 654 shares of stock of the St. Joseph Lead Mining Company.

The question propounded by the executors on this accounting is, whether the 654 shares of stock of the St. Joseph Lead Mining Company owned by the testatrix at the time of her death pass under the clause of the will above quoted, or whether that clause disposes of only 166 shares, and the remaining 472 shares go to the legatees mentioned in the residuary clause of the will.

The bequest of "my one hundred and sixty-six shares of St. Jo. Lead Mining Company" is a specific bequest, because the testatrix refers to particular property and describes its nature and quantity. (*Walton v. Walton*, 7 Johns. Ch. 258; *Crawford v. McCarthy*, 159 N. Y. 519.) In the case of specific legacies the will speaks as of the date of its execution. (*Matter of Delaney*, 133 App. Div. 409; *affd.*, 196 N. Y. 530.) The bequest of the 166 shares of the St. Joseph Lead Mining Company stock being a specific bequest, the will must be construed in its relation to that bequest as of the date of its execution. It was evidently her intention to give to the persons mentioned in the clause above quoted the shares of stock which she owned in the St. Joseph Lead Mining Company at the time of the execution of the will, and that that legacy was intended as compensation for the money which their father had borrowed from their grandmother, and which would have been bequeathed by their grandmother to them, if it had not been so borrowed.

At the time the will was executed the St. Joseph Lead Mining Company had accumulated a large surplus. This surplus was reflected in the market value of the stock, and it constituted

a substantial part of its intrinsic value. Subsequently when this surplus was distributed to the stockholders in the form of stock dividends, the intrinsic value of the original shares of stock was diminished, but the value of the additional shares received as a stock dividend when added to the value of the original shares would make a total closely approximating the value of the original shares before the declaration of the dividends. The declaration of a stock dividend did not add anything to the intrinsic value of the stock of the company upon which the dividend was declared; it was merely a distribution of accumulated surplus, and the advantage to the stockholders consisted principally in the fact that the increased number of shares of stock would necessitate the annual distribution of surplus in the form of dividends instead of the accumulation of such surplus by the company. The 166 shares held by the testatrix at the time she executed the will had, because of the surplus accumulated at that time, a potential value equal to the actual value of the 638 shares owned by her at the time of her death. None of these 638 shares was purchased by her after the execution of her will; they all resulted from the distribution of the surplus accumulated by the company, and were derived from the original ownership of the 166 shares.

The decision in *Brundage v. Brundage* (60 N. Y. 544), is distinguishable from the matter under consideration in the important particular that the bequest considered by the court in the *Brundage* case was a general bequest and not a specific one. I have had occasion to consider a similar question in *Matter of Leavitt* (86 Misc. Rep. 609), and am inclined to think that the reasons given for the conclusion at which I arrived in that matter apply with equal force and relevancy to the matter now under consideration.

I will therefore hold that the bequest of 166 shares of the "St. Jo. Lead Mining Company" stock and 33 shares of the "Cattle Co." was a specific bequest, and that the legatees to

whom that bequest was made are entitled to the 654 shares of St. Joseph Lead Mining Company stock held by the decedent at the time of her death.

Decreed accordingly.

Matter of the Estate of ALICE LEIGH, Deceased.

(Surrogate's Court, New York County, April, 1915.)

WILLS—DIRECTION AS TO DIVISION OF REMAINDER—PROVISIONS AS TO DIVISION OF RESIDUARY ESTATE.

Testatrix directed the division of the remainder of her estate between her two sisters, and "after that" among the living children of her own and her half brothers and sisters except the children of a deceased brother already provided for. Testatrix was survived by her sisters and a large number of nephews and nieces. A nephew and a niece predeceased testatrix and each left issue which survived her. *Held*, that the residuary estate should be divided into two parts; that the income from one of such parts should be paid to each of her sisters during their lives; that the bequest was to them as tenants in common, and that upon the death of either the one-half of the residuary estate held for her benefit should be divided among the nephews and the nieces of testatrix living at the time of her death.

PROCEEDING upon the accounting of an executor.

Geller, Rolston & Horan, for Farmers' Loan and Trust Company, as executor.

O'Flaherty, Fulton & Byrd, for Mrs. J. L. Harrison.

Willis B. Smith, for Mrs. A. C. Old.

Warren Leslie, special guardian.

Dawes, Abbott & Chester (Hamilton M. Dawes, of counsel), for Mary L. Adams and others.

FOWLER, S.—The Farmers' Loan and Trust Company has filed an account of its proceedings as executor of the last will and testament of the testatrix and asks the court to construe the following clause of her will:

"The remainders of my estate between my two living sisters, Julia Leigh Harrison, Tanstall, Virginia, and Anne Carter Old, Clayville, Virginia, and after that among the living children of my own and half brothers and sisters, except the children of my late brother, Chapman Johnson Leigh, as they are already provided for."

The testatrix was survived by her sisters, Julia Leigh Harrison and Anne Carter Old. She was also survived by a large number of nephews and nieces. Anne C. Wickman, a niece, and William Old, a nephew, predeceased the testatrix, and each of them left issue which survived her.

It is contended on behalf of the sisters of testatrix that they are entitled absolutely to the entire residuary estate, while the nephews and nieces contend that the said sisters are only entitled to a life estate in the residuary, and that the remainder vested in them, the nephews and nieces, upon the death of the testatrix. The children of Anne C. Wickman and of William Old contend that they are entitled to the share which their respective parents would have taken had they been living at the date of death of the testatrix.

This is a holographic will. It is inartistic in its arrangement and the language is not so clear and definite as to preclude considerable doubt concerning the intention of the testatrix. It is evident from a consideration of the entire will that she intended that her sisters should be the principal beneficiaries of her testamentary bounty, but as no provision was made for the nephews and nieces of the testatrix in any part of the will except that contained in the clause above quoted, it is reasonable to assume that she intended by the language of that clause to bequeath to them some interest in her estate. The use of the

words "and after that" indicates that she did not intend to give the residuary estate absolutely to her sisters. If she had intended that her residuary estate should be divided between her two sisters and that each should have one-half absolutely, there would be no need for the direction to make distribution among the children of her brothers and sisters, because there would be nothing to divide among them. This is not a case where a large number of bequests intervene between two apparently conflicting bequests under circumstances which might give rise to an inference that the testatrix had forgotten or overlooked the disposition of the property by a prior bequest. Here the bequest of the residuary estate is contained in one sentence. In the first clause of the sentence there is a bequest to the sisters; in the second there is a bequest to the living children of the brothers and sisters of the half and the whole blood of the testatrix. The ambiguity as to the quantity of the estate which she intended to give to her sisters arises from her failure to expressly define or describe the bequest to them. There is an absence of technical limitation. While she did not use words which would clearly indicate that she intended to limit the estate of her sisters to the terms of their respective lives, it is clear that she intended such a limitation by the use of the words "and after that among the living children," etc. A bequest of any part of the residuary estate to the living children of her brothers and sisters would be inconsistent with an absolute bequest of the same property to her sisters. But the bequests will not be sacrificed for apparent inconsistency when it is possible to construe the provisions of the will in such a manner as to reconcile the apparently conflicting clauses. (*Goodwin v. Coddington*, 154 N. Y. 283; *Frank v. Sturges*, 170 id. 482; *Matter of Griffin*, 75 Misc. Rep. 441; *Matter of Wagman*, 163 App. Div. 127.)

It appears to me, therefore, that it was the intention of the testatrix that her residuary estate should be divided into two

parts and that the income from one of these parts should be paid to each of her sisters during their lives; that the bequest was to them as tenants in common (*Van Brunt v. Van Brunt*, 111 N. Y. 178; *Mills v. Husson*, 140 id. 104), and that upon the death of either of the sisters the one-half of the residuary estate held for her benefit should be divided among the nephews and nieces of the testatrix who were living at the time of her death.

It is a well-established rule of interpretation that unless the time to determine the right of persons to take as survivors is clearly fixed as the date of the termination of the particular estate, it will be presumed to be the date of death of the testatrix. (*Matter of Geissler*, 72 App. Div. 85; *Embury v. Sheldon*, 68 N. Y. 227; *Washbon v. Cope*, 144 id. 287.) The testatrix was careful to indicate the children of her brothers and sisters who would take upon the termination of the life estate given to her sisters, namely, those who were living at the time of her death. Her use of the words "living children" indicates that she wished to exclude from participation in her estate the children of any of the nephews and nieces who had predeceased her. Unless so construed those words would be meaningless. It seems to me, therefore, that the children of the nephews and nieces who predeceased the testatrix are not entitled to any part of the residuary estate left by her.

I will appoint Peter B. Olney, Esq., referee to hear and determine the claims presented by May Love Landon against the estate and which have been rejected by the executor. The account of the executor does not show whether the claim of Dr. Huddleston has been admitted or rejected. If it has been rejected by the executor it will be determined by the referee appointed to hear and determine the claims of May Love Landon.

Upon the filing of the referee's report a decree may be submitted on notice providing for distribution of the estate among

the legatees and directing that the residuary estate be held by the executor named in the will for the purpose of paying the income thereof to the sisters of testatrix during their respective lives, and for distribution among the remaindermen upon the termination of the particular estate.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of FLORENCE B. MEAD, WILLIAM C. DURBIN and JOHN B. CLARK, as Executors of the Last Will and Testament of WILLIAM E. ADAMSON, also Known as WILLIAM E. WARD, Deceased.

(*Surrogate's Court, Kings County, April, 1915.*)

**WILLS—DELIVERY OF CHECK BY TESTATOR THREE DAYS BEFORE DEATH—
REVOCATION OF AUTHORITY.**

Where testator drew his check for \$20,000 to the order of his daughter and delivered it to her three days before his death, and she delivered it to her own bank which, through its correspondent, collected it from the trust company on which it was drawn, but it was not paid to her until two days after decedent's death, her contention upon the accounting of the executors, of whom she was one, that by the delivery of the check to her and payment thereof she became the absolute owner of the \$20,000 was untenable and she must restore it to the estate.

Upon the delivery of the check to the daughter she became decedent's agent to withdraw the amount called for by said check, and her authority as such agent was revoked by his death.

PROCEEDING upon the judicial settlement of the accounts of executors.

Ferriss & Storck, Ottaway & Munson, and G. A. McLaughlin, for accounting executors.

Callahan & Hagarty, for William E. Hallock, objectant.

Robert E. Samuels, for George Reeve Hallock, objectant.

KETCHAM, S.—The decedent, having an ordinary deposit account in a trust company, drew his check thereon to the order of his daughter for \$20,000 and three days before his death delivered the same to her. She delivered it to her own bank, which, through its correspondent bank, collected it from the trust company on which it was drawn, but it was not paid until two days after the decedent's death, and the amount then paid reached the hands of the payee.

The daughter is one of the executors, who claims in the present accounting that by the delivery of the check to her and its payment "she became the absolute owner of the fund individually."

This contention is answered by an opportune and convincing authority (Matter of Stacey, 89 Misc. Rep. 88), in which, reported since this case was tried, it is held as to checks which were collected by the payee after the death of the maker, that "her authority to draw the money was revoked by the death of the testator (maker);" that "she, therefore, had no authority to draw the money after the death of the testator; that it (the money) constituted a part of the testator's estate, and the fact that the banks paid it to the * * * (payee) did not confer upon her any right to its possession."

The accountants urged that the learned surrogate from whom the foregoing quotation is taken errs in his statement that the payee's "authority was revoked by the death" of the maker; but their argument is wholly based upon their own erroneous assumption that by the making of a check no agency or authority is lodged in the payee. On the contrary, the effect of every normal check is as if in the instrument itself were the words: "I hereby give to the payee the power and authority in my behalf, and as my agent, to withdraw the sum herein mentioned." That is the agency to which primarily the rule of revocation is directed. Like all other agencies, not coupled

with an assignment or interest, it is revoked by the principal's death.

It must be conceded that the rule also involves the theory that the bank on which the check is drawn is an agent of the maker authorized to pay the amount and that the bank's agency is also subject to revocation. But it still remains impossible to accept the accountant's personal dogma that the bank is the "only agent in the case of a check."

The executors suggest a radical difference between the two cases, since in the case cited all the checks were collected by the payee herself, and in the case at bar the check was collected by the intermediate banks which were the indorsees and agents of the payee.

The collecting banks collected, not for themselves, but for the payee and only under her power and direction. Their act was hers and their possession of the proceeds of the check was hers. The only effect of the transaction was that the money was paid to her, and the analogy of the Stacey case appears.

The general learning upon the subject herein discussed is well set forth in the opinion of the late William Allaire Shortt, referee, in *Bainbridge v. Hoes*, affirmed upon his opinion, N. Y. L. J., April 18, 1914.

This case has nothing to do with the rule by which a bank is afforded safety, where it has paid a check without knowledge of the death of the maker. The condition which alone provoked that rule is not found in this transaction. All the banks are safe.

All the executors should be charged in the sum of \$20,000, with proper interest thereon. Those who are associated in office with the daughter have affirmed her right to withhold this sum. If the daughter makes restitution the question of liability will no longer concern her fellow executors. If she cannot restore, it will be the result of their supine approval of her conversion of a part of the estate.

As to the payment to Catherine Wenz, the account is approved. There was some evidence tending to show that the payment was for services rendered to the decedent, and the objectants failed to sustain the burden of showing the contrary.

The decree should conform to the rulings made upon the trial and the views expressed in this opinion.

Decreed accordingly.

**Matter of the Probate of the Last Will and Testament of
HENRY STOLL, Deceased.**

(Surrogate's Court, Kings County, April, 1915.)

WILLS—PROBATE OF—WHEN FACTS UNKNOWN CANNOT BE REGARDED IN DETERMINING STATE OF MIND—EVIDENCE AS TO EXISTENCE OF A FACT—WHAT CONSTITUTES INSANE DELUSION.

In a proceeding for the probate of a will wholly in favor of testator's son, contested by the widow upon a claim that the mind of decedent was obsessed by insane delusions, proof was made by contestant of testator's declarations, which both in express and topical form tended to show that he believed that his wife who for years had lived apart from him by agreement was unchaste, but no direct evidence was given as to whether testator had any basis or justification for such belief, *held*:

Facts unknown to a person whose mind is under observation cannot be regarded in determining the state of his mind.

Proof of an external fact, to be used to determine that a belief in its existence was sane, cannot be given unless founded upon evidence that the belief was conceived with knowledge of the fact, either actual or constructive.

No fact can be shown for the purpose of characterizing or revealing a mental state unless it be the naked fact of knowledge itself on the part of the person whose mental attitude is in question.

Evidence may not be given of the existence of a fact belief in the existence of which is claimed to constitute an insane delusion unless there be evidence or circumstances showing, or from which it can be presumed, that knowledge of the fact was brought to the mind of the subject so as to operate thereon.

Proof of the existence or non-existence of a fact the belief in which by a person is claimed to constitute an insane delusion may, however, be given if it concerns matters directly affecting his own person or presence and necessarily open to his knowledge.

MOTION for a new trial.

James Crooke McLeer (Almet Reed Latson, of counsel), for proponent.

Lind & Pfeiffer (Alfred D. Lind and Alexander Pfeiffer, of counsel), for contestant.

KETCHAM, S.— The decedent left him surviving his wife and the son of a former wife. His will is wholly in favor of the son and is contested by the widow upon the familiar allegations.

The jury has found, among other things, that the testator was without testamentary capacity; and the proponent, the son, moves for a new trial upon grounds which were adversely disposed of on the argument, except that one assignment of error was reserved for the present discussion.

Proof was made by the contestant of declarations of the testator which both in express and topical form tended to show that he believed that his wife was unchaste. No direct evidence was given as to whether the testator had any basis or justification for this belief.

When the will was made the testator and his wife had by agreement lived apart for years, the husband in New York city and the wife in Albany.

In rebuttal, questions were asked by the proponent, which, with the answers thereto, were as follows: "Q. Did you ever see Mrs. Stoll under the influence of liquor? A. I did. Q. Where and when? A. At her own home."

After the giving of these answers an objection made thereto

was sustained, under exception. No motion was made that the testimony be stricken out.

Another witness was then asked whether she had ever seen the wife intoxicated. Objection to this question was sustained and exception was taken to the ruling. Before the disposition of this objection, counsel for the proponent disclaimed that he was about to show that what had been the behavior of the wife was known to the husband. There was no evidence tending to prove that the testator had at any time become either actually or constructively aware of any intoxication upon the part of his wife, or that the testator expressed or maintained a belief, sane or insane, that his wife was given to intoxication or was ever intoxicated.

The only claim by the contestant as to the testator's insanity on the subject of his wife was that he declared a belief in her unchastity, and that there was evidence tending to show that such belief was unfounded and irrational.

It is apparent that instances of drunkenness of the wife, without any circumstance to indicate that her condition was the cause or concomitant of a grosser fault, would not save the belief as to her virtue from the likeness of delusion, even if the fact of mere intoxication were shown to have come to the knowledge of the testator. Indeed, a jury might well determine that it was insanity on the part of the decedent to regard acts of drunkenness as a basis for the conclusion that the drunken person was unchaste.

Moreover, the proposed testimony would seem to be forbidden by the absence of any evidence that the inebriety which the proponent sought to show came to the testator's attention and by the avowal that no such evidence was within the proponent's command.

The court remains persuaded that it is impossible to test the state of a man's mind by a fact which never approached his mind. To measure a consciousness by something of which it

was never conscious would require from the court more than an acquaintance with insanity; it would involve a personal intimacy.

There are cases, entirely foreign to the present question, where the fact as to which the subject has formed a belief may be shown without express proof that it became known to him. Where the belief has been indulged notwithstanding facts which occurred in the home or the community of the believer, or under other conditions which would give rise to the presumption that he knew that which was generally known, the presumption is itself evidence tending to show his knowledge, and the existence of the facts may well be shown without proof, other than the presumption, that they came to his attention. If the belief was extravagant, contrary to human experience or forbidden by recognized physical laws, the facts which would tend to show that it was irrational are presumed to have been known to the person entertaining the belief, and neither the fact nor the knowledge thereof need be shown otherwise than by the presumption.

In none of these cases have the courts suggested that facts unknown to the person whose mind is under observation may be regarded in determining the state of his mind. On the contrary, these instances, and the rule which they have provoked, support rather than defeat the proposition that nothing which is not shown to have been apprehended by the mind in question can be used as a standard for its analysis.

Any presumption in this case that the testator became aware of the matters offered in evidence is excluded by the proven circumstances, and it is confessed that there is nothing directly tending to show his acquaintance with his wife's conduct or habits with respect to drunkenness. Neither by demonstration nor inference is it shown that any of the transactions which are alleged as a just measure of his mental state came within his apprehension.

If it be conceded for a moment that drunkenness alone has anything to do with unchastity, the question at bar is reduced to these terms: Can proof of an external fact be used to determine that a belief in its existence was sane, when it must be found upon all the evidence that the belief was conceived and maintained without knowledge, either actual or constructive, as to the fact?

If this may be answered in the affirmative, medical science will be afforded novel resources, both of diagnosis and of therapeutics. Of course, a fact of which the patient is unaware becomes at once a symptom of his disorder, and hope is inspired that the condition will be palliated, if not cured, by the removal of the thing which causes and demonstrates the malady.

There will then be judicial assurance to a suspected wife that if she will debase herself with drink her sacrifice will establish her husband's reason. She will find herself under the dread burden of regulating his mental condition from day to day according to the scope of her devotion and her endurance. It will, of course, result that the suffering husband will oscillate between sanity and insanity just as his belief does or does not conform to the alternations of sobriety and drunkenness which his fellow sufferer may maintain, but always with the serene incentive to the wife that if without his knowledge she is able to sustain a perennial inebriety he will be redeemed to permanent health.

Definitions taken from the opinions of judges are cited in support of the contention that a belief is sane or insane according to its correspondence with the actual fact, even though the fact is not shown by presumption or primary proof to have come to the knowledge of the believer. These definitions are detached from the setting of fact to which they were confined, and in many instances from their qualifying context. In some cases cited by the proponent this meaning is imposed upon opinions which have dealt only with the truth or untruth of the sub-

ject's belief as to matters directly affecting his own person or presence and necessarily open to his knowledge. (*Dobie v. Armstrong*, 160 N. Y. 584; *Matter of White*, 121 id. 406; *Seamen's Friend Society v. Hopper*, 33 id. 619; *Matter of Townsend*, 73 Misc. Rep. 481; *Hoyt v. Hoyt*, 9 N. Y. St. Repr. 731.)

In each of these cases the court expressly rested its reasoning upon the fact that circumstances offered in evidence to show the error of the belief were within the observation of the believer. (*Seamen's Friend Society v. Hopper*, *supra*, 625; *Matter of White*, *supra*, 413, 414; *Dobie v. Armstrong*, *supra*, 590, 592, 593; *Matter of Townsend*, *supra*, 485; *Hoyt v. Hoyt*, *supra*, 744 *et seq.*)

Two cases are found by the proponent in which his position is asserted. (*Stevens v. Leonard Executor*, 154 Ind. 67; *O'Dell v. Goff*, 153 Mich. 643.) To them may be added *Burkhart v. Gladish*, 123 Ind. 337, 346, and *Commonwealth v. Wilson*, 67 Mass. 337.

None of these decisions are of controlling authority and they exhibit no reasoning which compels acceptance. No trace has been found in the judicial writings of this State of the adoption of their conclusions or of any equivalent statement, while their doctrine has been resolutely rejected in many cases which, though they did not touch insanity, are nevertheless concerned with the mental state.

What difference does it make whether the testimony is offered to show mental equilibrium or any other mental condition? Can it be possible that one rule applies if the mind is searched for malice, fear, excitement or other emotion, and still another when the endeavor is to see if a belief is sound and rational? Is not the problem, as well as the process, the same, whenever a litigant would resort to the objective fact to determine any condition or operation of the thinking self?

It is the law of New York, well defined and uniformly ap-

plied to many phases of consciousness, that no fact can be shown for the purpose of characterizing or revealing a mental state unless it be the naked fact of knowledge itself on the part of the person whose mental attitude is in question. Thus, in cases where the motive for homicide is the issue, declarations of the accused are held to be admissible to show the frame of mind in which he approached his act, but the truth of the declarations is excluded, obviously upon the theory, for no other will serve, that the fact to which the declarations were directed could not have been influential upon his mind, if unknown to him.

This deeply-settled rule was not made solely for murder cases, nor has it any reason for existence which does not require its application to all inquiries as to the state or movement of a mind. If it be accepted as comprehensive, the teaching of the four cases cited from other States can find no lodgment in this commonwealth, and the evidence considered *supra* was properly rejected. The motion is denied.

Motion denied.

Matter of the Application of JENNIE POLANSKY and Others
for Leave to Intervene in the Matter of Proving the Last
Will and Testament of JACOB HYMAN, Deceased.

(*Surrogate's Court, Kings County, April, 1915.*)

STATUTE OF DISTRIBUTION—WHO TAKES ENTIRE PERSONAL PROPERTY—
APPLICATION TO INTERVENE IN PROCEEDING TO PROBATE, WHEN DENIED.

Where a testator died in 1915 leaving him surviving no next of kin nearer than cousins and children of deceased cousins, the cousins take the entire personal estate, and an application by the children of deceased cousins to intervene in a proceeding to probate the will upon a claim that petitioners would be entitled to share in decedent's estate if it were found that he died intestate must be denied.

APPLICATION for leave to intervene.

I. Gainsburg, for motion.

Isaac Lublin, opposed.

KETCHAM, S. — The decedent died on January 13, 1915, leaving him surviving no next of kin nearer than cousins and children of deceased cousins.

In this proceeding for probate the children of deceased cousins seek to intervene, upon the claim that they would be entitled to share in the decedent's estate if it were found that he died intestate.

The Statute of Distributions is definitely construed to mean that the representation which is permitted to descendants of brothers and sisters of the decedent is denied to the descendants of any collateral relation of the decedent other than a brother or sister. (*Adee v. Campbell*, 79 N. Y. 52; *Clements v. Babcock*, 26 Misc. Rep. 90; *Matter of Nichols*, 60 id. 299; *Matter of Barry*, 62 id. 456; *Matter of Schlosser*, 63 id. 166; *Matter of Youngs*, 73 id. 335; *Utica Trust & D. Co. v. Thomson*, 87 id. 32.)

Some of the cases cited arose under the present statute, which provides: "No representation shall be admitted among collaterals after brothers' and sisters' descendants." (*Decedent Estate Law*, § 89, subd. 12.)

Some arose under the earlier statute, in which the provision was: "No representation shall be admitted among collaterals after brothers' and sisters' children." (*Code Civ. Pro.*, § 2732, subd. 12.)

But for the present purpose, all these cases have the same meaning, and they wholly exclude the second cousins from representation.

Neither *Matter of De Voe*, (107 App. Div. 245; *affd.*, 185

N. Y. 536), nor Matter of Prote, (54 Misc. Rep. 495), has any application. Both were decided under the same statutory condition. At the time of the death of the decedents in both these cases the provision "No representation shall be admitted among collaterals after brothers' and sisters' children" was repealed, and there had been put in its place: "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate." (Laws of 1898, chap. 319.)

That Matter of Prote (*supra*), contains nothing to support the contention of the moving parties appears when we find that the late Surrogate MILLARD, who wrote therein, was afterward constrained by subdivision 12 of section 98 of the Decedent Estate Law, as it now stands, to hold that, where the decedent left no nearer kin than cousins and descendants of deceased cousins, the cousins take the entire personal estate. (Matter of Schlosser, *supra*.)

The motion must be denied.

Motion denied.

Matter of the Appraisal Under the Transfer Tax Law of the
Estate of CHARLES L. ROOS, Deceased.

(Surrogate's Court, County of Bronx, May, 1915.)

TAXES—TRANSFER TAX—PROCEEDING TO FIX CASH VALUE OF SHARES OF STOCK—WHEN ARBITRARY DEDUCTION OF AMOUNT CLAIMED FOR DEPRECIATION IN VALUE OF STOCK CANNOT BE ALLOWED—DECEDENTS' ESTATES.

In a proceeding to fix the cash value of shares of stock of a corporation, property of the decedent, the transfer of which is subject to a tax under the Transfer Tax Law, it appeared that the president and the decedent, the vice-president and treasurer of the corporation, who owned the bulk of the stock of the corporation, failed to draw salaries commensurate with the services rendered by them, and permitted the difference between what

they earned and what they received to accumulate as profits. In appraising the value of the good-will in fixing the value of the shares of stock, the appraiser treated this difference as profit. *Held*, that a fair deduction from these apparent profits of an amount as a salary for services rendered is justified in arriving at the value of the good-will of the business and should have been allowed, and the report should be remitted to the appraiser for correction in this respect.

Where in such a proceeding a deduction of an amount is claimed for possible depreciation in the value of the stock and there is no proof of such depreciation, the arbitrary deduction of such an amount is not justified and cannot be allowed.

APPEAL from an order assessing a transfer tax.

Man & Man, for appellant.

John Boyle, Jr., for State Comptroller, respondent.

SCHULTZ, S. — The executrix appeals from an order fixing the cash value of the property of the decedent, the transfer of which is subject to the tax imposed by the act relating to taxable transfers. (Tax Law, art. X, § 232, being Laws of 1909, chap. 62, and constituting Consol. Laws, chap. LX.)

The decedent at the time of his death was a stockholder and officeholder of the corporation known as William S. Hedges & Company. The capital stock of this corporation consisted of 2,000 shares, having a par value of \$100 each, of which the holding of the decedent amounted to 635 shares. About 1,100 shares were owned by the president of the company and the remaining shares were owned in various amounts by three other stockholders of the corporation. All of the stockholders of the corporation were also officers of the corporation and were actively engaged in its business.

In arriving at the value of the said shares of stock for purposes of taxation, the appraiser declined to permit a deduction of \$20,000, called a "surplus reserve" and being a deduction of ten per cent. from the face value of the assets, and he also

placed a value on the good-will of the business of the corporation and by so doing assessed each share of stock owned by the decedent at \$159.61.

The appellant raises two questions on her appeal. She claims that it was an error to include the said \$20,000 in arriving at a valuation of the shares of stock of the corporation and that it was also error on the part of the appraiser to place any value upon the so-called good-will of the business. The amount fixed as a possible depreciation in the value of the stock and to cover losses due to bad debts and other contingent causes was no doubt a wise precaution adopted to ascertain a conservative value of the property of the corporation; but there is no proof that there was any depreciation in the value of the stock or that there were any bad debts or contingent losses other than those for which allowance has been made, and the arbitrary deduction of this amount from the assets of the corporation is therefore not justified in my opinion.

The corporation was engaged in buying and selling pearls and precious stones and conducted almost exclusively a wholesale trade, the testimony being that only fifteen per cent. of the sales were made at the place of business of the corporation. Its president received a salary of \$5,000 a year. The decedent, who was vice-president and treasurer, received a salary in 1912 of \$3,200, and in 1913 a salary of \$2,933.32. The second vice-president received a salary of \$7,314.81 in 1912 and \$7,752.70 in 1913. The secretary received a salary of \$5,828.70 in 1912 and \$5,938.17 in 1913, and the assistant secretary received a salary of \$3,500 in the year 1912 and \$4,200 in 1913. The appraiser in arriving at the good-will of the business took the profits of the last three years and deducted therefrom the interest on the average working capital at six per cent. per annum from that time and made an allowance of loss for bad debts and thereby arrived at the figure \$42,915.69 as the value of the good-will, amounting to \$21.46 per share.

That the good-will of a business, if such there be, is subject to a tax, I think is settled. (*Matter of Vivanti*, 138 App. Div. 281; 146 id. 942; *affd.*, 206 N. Y. 656; *Matter of Ball*, 161 App. Div. 79; *Matter of Keahon*, 60 Misc. Rep. 508.)

The appellant claims, however, that the appraiser erred in arriving at his valuation for good-will, because the president and the decedent owned the bulk of the stock, and for that reason did not draw salaries which were proper compensations for their respective services, but permitted the difference between what they did receive as a salary and what they should have received to accumulate. The subordinate officers of the corporation owning but a small amount of stock, she claims, drew about what their services were worth. The testimony is that the value of the services rendered by the president was at least \$15,000 a year and that if he had drawn the same instead of allowing it to accumulate, and the decedent had been paid a salary commensurate with the service rendered by him instead of permitting a like accumulation, the profits would thereby have been materially less and the good-will of the business, calculated upon a basis of profit, would be valued at nothing.

The corporation was a close one. The stock was not listed and no sales of it had ever occurred prior to the death of the decedent, other than those when the corporation was originally formed. Where such a condition obtains, it is difficult to fix the value of the stock, and it is often possible to get at it only by ascertaining the value of the property which it represents, (*Matter of Jones* 172 N. Y. 575), and even then it can be ascertained only with reasonable certainty. (*Matter of Rees*, 208 N. Y. 590, *affg.* order of surrogate without opinion.)

After the death of the decedent, however, and within a few months thereafter, the executrix sold 57 of the 635 shares that had been owned by the decedent to three of the other stockholders of the corporation at \$120 per share. The testimony is that this amount was the fair and reasonable market value

of the stock at that time and, if nothing occurred to depreciate the value of the stock between the death of the decedent and the date of the sale, it is fair to assume that if the sale price was the fair and reasonable value of the stock at the time of sale, it was also the fair and reasonable value at the date of the death of the testator. It is conceded by the appellant, however, that between the date of the death of the testator and of the sale a dividend of four per cent. was paid, and it is urged upon her behalf that the value of the said shares should therefore have been assessed for purposes of taxation at \$124. This figure was arrived at after the deduction of ten per cent. from the book value, being a proportionate share of the "surplus reserve" of \$20,000 above referred to, and without such deduction the petitioner concedes that the book value of the shares was about \$138 per share. The reason given by the petitioner, however, for the apparent profits upon which the appraiser bases his valuation of good-will, namely, that the two main stockholders failed to draw salaries commensurate with the services rendered by them and permitted the difference between what they earned and what they received to accumulate and thus appear as profit, when in truth and in fact it was not profit but represented the salaries of the two respective officers, seems reasonable to me, particularly so when viewed in the light of the salaries paid to subordinate officers who, as shown by the testimony, rendered no more valuable services to the corporation than did the two main stockholders and officers thereof. A fair deduction from apparent profits as a salary for services rendered seems to be justified. (Matter of Crerand, N. Y. L. J., June 30, 1914.)

Considering the nature of the business, before alluded to, the testimony as to such good-will given by the witness and making an allowance for salaries to the president and to the vice-president and treasurer, for their services, I reach the conclusion that the good-will was of no value. If I am right in my

conclusions it follows that the appraiser should not have added the item of \$21.46 to each share as representing a proportionate part of such good-will. I am of the opinion that a fair valuation of these shares for purposes of taxation should have been fixed at the sum of \$138.15 per share, being the book value thereof, without any assessment for good-will, and being also about the sale price thereof, plus the allowance made as a part of the "surplus reserve" and plus the dividend declared after the death of the testator.

The report is therefore remitted to the appraiser for correction in accordance with this opinion.

Report remitted to appraiser for correction.

Matter of Proving the Last Will and Testament of PETER
McDERMOTT, Deceased.

(Surrogate's Court, County of Bronx, May, 1915.)

WILLS—UNDUE INFLUENCE—TESTAMENTARY CAPACITY—FAILURE TO SUSTAIN BURDEN OF PROOF—WHEN NOT SUFFICIENT TO RENDER TESTAMENTARY DISPOSITION INVALID.

Before an instrument propounded as a will can be criticised as unnatural for the reason that it ignores relatives and leaves all of decedent's estate to strangers, the relations existing between the decedent and his heirs at law and next of kin should be considered to ascertain whether it is contrary to what the testator from his feeling towards his relatives, if known, would have been expected to make; and when such inquiry disclosed an apparent lack of intimacy between the testator and his relatives and a seeming lack of interest on their part for the welfare and care of the testator in his old age and ill-health, *held*, that little weight can be given to the contention that the provisions of the propounded document are unnatural and indicate a lack of testamentary capacity.

Undue influence is an affirmative assault upon the validity of a will and must be proved by the contestant.

The burden of proving testamentary capacity of the decedent at the time of the execution of the propounded document is upon the proponent.

Testimony examined and analyzed and held that the contestant had failed to sustain the burden of proof on the issue of undue influence, and that the proponent had sustained the burden of proof of testamentary capacity and that, therefore, the instrument offered should be admitted to probate.

That the decedent was old, slovenly in dress and given to peculiarities of speech and habit which at times were such as to impress others that they were irrational, is not sufficient to render a testatmentary disposition of his property invalid.

Even if the decedent had been insane and had been so adjudged, his will would be valid if made during a lucid interval.

PROCEEDING for the probate of a will.

Joseph H. Fargis, for proponent.

Randolph Parmly, for Peter J. McDermott et al., respondents.

William J. O'Donnell, for Charles McDermott et al., respondents.

Frederick A. Stroh, special guardian for infants, respondents.

SCHULTZ, S. — The instrument offered for probate as the last will and testament of the decedent bears date January 6, 1914. On the twenty-fourth day of January he was removed from his place of residence to a private hospital and sanatorium where he died on February 6, 1914. He had been suffering with cancer of the rectum, characterized by the medical witness as a progressive disease. He left him surviving as heirs at law and next of kin and a half-brother, half-sisters, nephews, nieces, grandnieces and a grandnephew, in all forty-one in number. Some of these heirs at law and next of kin have filed objections to the propounded document upon the usual grounds.

The evidence is clear and to my mind convincing that the document in question was executed on the day it bears date and that the statutory formalities of execution were fully complied with, and I so find. Two questions remain for consideration, namely, whether the execution of the instrument was procured by the exercise of undue influence, restraint, fraud or duress, and whether the alleged testator at the time of execution was of sound and disposing mind and memory.

There is no evidence that the testator was under any restraint at the time of the execution of the alleged will, or that any fraud was perpetrated or duress exercised. The evidence as to such execution, on the contrary, indicates that he was free from the same. Nor is there any evidence which in my opinion would make a finding possible that the document was procured by undue influence. The latter being, as defined by the Court of Appeals, "an affirmative assault on the validity of a will" (Matter of Kindberg, 207 N. Y. 220), must be proved by the contestant, and from the evidence before me I conclude that the contestants have not sustained the burden of proof which is upon them in this regard. Opportunity to exercise undue influence is not enough to justify the conclusion that it was exercised. (Cudney v. Cudney, 68 N. Y. 148; Post v. Mason, 91 N. Y. 539.) I accordingly determine that the document was not the result of such influence.

The only question which I consider debatable is whether the decedent was of sound mind when the act of testation took place. It is proper that in considering the testamentary capacity of this alleged testator, his life, surroundings, relationships and friendships should be inquired into. He was upwards of seventy years of age and lived alone in a tenement house, occupying four rooms. Of his forty-one relatives, two resided within a comparatively short distance of his home; two resided in the State of New Jersey within about two hours

travel from his home, and the others lived considerable distances from his place of abode, some in Ohio and others, among whom were seven minors, in Europe. There is no testimony in this proceeding which shows that any of the thirty-four relatives of full age ever showed any solicitude for this old man. With the exception of that of one witness, who testified that two years ago a man called upon the decedent who stated that he was his nephew, and that the same man called again in November, 1913, the testimony on both sides seems to be in accord and to the effect that none of his relatives who lived within calling distance ever visited him or paid the slightest attention to his wants. Nor is there anything before me which indicates that those who lived at a distance ever showed that they knew of his existence or ever gave him a thought or sent him a word of greeting. On the contrary one of the witnesses with whom the decedent was on terms of intimate friendship testified that he told her that he never received any mail.

It is urged on behalf of the contestants that the fact that the decedent in the propounded document made no provision for any of these relatives, but on the contrary left all his property consisting of some \$12,000, as set forth in the amended petition, to a person not related to him, lays the alleged will open to the criticism that it is an unnatural will. Before the instrument is criticized in that respect, the relations existing between the decedent and his heirs at law and next of kin should be considered to ascertain whether it is contrary to what the testator from his feelings toward his relatives, if known, would have been expected to make; and when as here such inquiry discloses an apparent lack of intimacy between the testator and his relatives and a seeming lack of interest on their part for the welfare and care of the testator in his old age and ill health, I am not inclined to give much weight to the contention that the provisions of the propounded document are unnatural and indicate a lack of testamentary capacity.

The burden of proving the testamentary capacity of the decedent at the time of the execution of the propounded document is upon the proponent. (Cases cited in *Matter of King*, 89 Misc. Rep. 638.)

Three witnesses testified to his mental condition upon the day the document was executed. Of these, two were subscribing witnesses. One of these subscribing witnesses had never seen the decedent before and his opportunity to judge of the decedent's mental capacity was limited to a period of about fifteen minutes in duration during which the document was executed. His opinion is that the testator was of sound mind at that time, but his opinion must be considered in the light of the short time which he had to observe the decedent and the occurrences which took place at that time and upon which that opinion was based. The other attesting witness, however, knew the decedent for upwards of four years and had been in the habit of having a few words of conversation with him once or twice each week during that period, the witness being an attendant in the church at which the decedent attended and meeting him during the church services. He testifies to receiving instructions for the preparation of the will on January third and to his attendance on January sixth. Another witness who saw him on that day was a neighbor living in the same house who attended to his wants during his last illness and before he was removed from his home, and saw him practically every day for a period of six years, and she testifies that his acts and conversations impressed her as rational. She also testifies that on the very evening when the will was executed he went to church, and after services spent about half an hour with her and her family in her apartment. The landlord of the premises where the decedent resided testifies to seeing him on numerous occasions, one of which was the day before the document was executed and states that his conversations and acts at that time as testified to by him impressed him as being rational. No witness offered

by the contestant testifies to having seen him on the day the will was executed. Several witnesses testified to acts of the decedent and conversations had with him during the months of November and December preceding the execution of the instrument, which impressed them as being irrational. Two neighbors who resided on the same floor of the tenement where the testator lived also testified to occurrences, some of which took place a few days before the date of execution of the instrument, and some nine or ten days after that date, which they say impressed them as being irrational. A police officer who was sent to investigate the condition of the decedent on or about the eighteenth day of January and who then spoke to and examined him and who appears to have no interest in the matter at all, although he testifies that he had known the beneficiary for some ten years, being on patrol in front of the latter's place of business, says that the acts and declarations of the decedent impressed him as being rational, and the physician who examined him when he entered the hospital on January twenty-fourth states that the ailment from which he was suffering was one which would not affect the mind except during its last stages.

There is no evidence before me upon which I can base any conclusion as to the relations existing between the decedent and the beneficiary mentioned in the alleged will, except the testimony of one of the subscribing witnesses, as to a statement made to him by the decedent and the recital in the instrument. It appears that the subscribing witness who attended to having the document drawn was a friend of the sole beneficiary and that when it was about to be executed he went out to look for some one to act as witness and then brought in the other subscribing witness; and it developed that this subscribing witness was also a friend of the beneficiary and that subsequently to the drawing of the paper the beneficiary married the sister-in-law of this witness. The subscribing witness first alluded to states

that when he met the other subscribing witness he did not know that the latter was friendly with the sole beneficiary. The lack of testimony from which I could obtain an insight into the relations between the testator and the sole beneficiary, and the friendly relations which exist between the subscribing witnesses and the beneficiary, have caused me to scrutinize the testimony with great care.

The decedent, the attesting witness who attended to the drawing of the will, the beneficiary and the other attesting witness were all residents of the same neighborhood and attended the same church and there was nothing inherently improbable in their testimony, as to the facts surrounding the execution of the paper. If, therefore, I were to disregard the testimony of the witnesses who testified to the decedent's condition and to his acts and declarations on the date when the document was executed, I could assign no reason for doing so other than the fact that two of them knew the beneficiary. So far as the evidence discloses, they have no personal interest in the matter. It is true that there is a discrepancy between the testimony of one of the subscribing witnesses and the witness who attended the decedent as to the time of the execution of the will. This subscribing witness says that he came there in the evening about seven o'clock, left about fifteen minutes past seven, coming back at a quarter to eight and then remained twenty minutes, whereas the witness attending the decedent says that the decedent left for church at seven-thirty and came back at about eight-thirty. The time of the occurrence as testified to by each of these witnesses cannot be correct, but the very fact that they do not agree upon the exact time is to my mind an indication that they are telling the truth. If a conspiracy existed here to uphold this alleged will, the discrepancy in time as testified to would very likely not have existed. The circumstance that when the one subscribing witness went out to look for some one to act as a second witness he found a friend of the beneficiary.

and one whose sister-in-law the beneficiary subsequently married, has also been considered by me, but, in view of the fact that all of the parties were residents of the same immediate neighborhood, I do not attach to it the importance urged by the contestants.

That the decedent was old, slovenly in dress and given to peculiarities in speech and habit which at times were such as to impress the witnesses who so testified that they were irrational, I have no doubt, but such is not sufficient to render a testamentary disposition of his property invalid. (*Hartwell v. McMaster*, 4 Redf. 389; *Matter of Murphy*, 41 App. Div. 153; *Schouler Wills & Adm.*, § 149.) Even if he had been insane and had been so adjudged, his will would be valid if made during a lucid interval. (*Jarman Wills* [6th ed.] *37; *Schouler Wills & Adm.*, § 81; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Matter of Coe*, 47 App. Div. 177.) The issue presented a question of fact which has not been without its difficulties of solution, but, upon the whole testimony, I reach the conclusion that the proponent has sustained the burden which I believe to be upon him, and that the testator was competent to execute a will of real and personal property when he executed the instrument in question. The propounded document will therefore be admitted to probate, with costs to the proponent and the special guardian to be taxed.

Probate decreed.

Matter of the Estate of FRANK HARTLEY, Deceased.

(*Surrogate's Court, New York County, May, 1915.*)

TRUSTEES—TESTAMENTARY—DIRECTION TO PAY GENERAL GUARDIAN ACCUMULATED INCOME OF TRUST FUNDS.

Where testamentary trustees are directed to set apart as a separate fund either money or securities, or both, sufficient in their judgment to produce a clear net income in a certain amount and pay the same from the time of testator's death to a certain person six years of age for the purpose of his education until he becomes of age, the trustees will be directed to pay his father as general guardian the accumulated income of the trust funds, the trustees under the language of the will having no discretion in the matter.

APPLICATION by general guardian to compel trustees to pay net income of a trust fund.

Alexander & Green, for petitioner.

Speir & Bartlett, for M. Taylor Payne et al.

COHALAN, S. — This is an application by a general guardian of an infant to compel the trustees of a testamentary trust to pay to said general guardian the net accumulated income of the trust fund. The trust was created by the following provision of a codicil to the will: "I direct my executors hereinafter named to set apart as a separate fund money or securities, or both, sufficient in their judgment to produce a clear net yearly income of five hundred dollars (\$500), and I give said fund to my trustees hereinafter named, in trust to pay the net income thereof from the time of my death, to Frank Hartley Shearer, son of Leander H. and Grace A. Shearer, for the purpose of his education, until the said Frank Hartley Shearer shall attain the age of twenty-one years." The infant is now six years of

age. The infant's father is his general guardian. The trustees have in their hands income in the sum of \$828.61, and "are ready and willing to apply so much of said income" for the purpose of the education of the infant "as may be necessary and proper." The trustees do not deem it advisable to expend all of the yearly income for education when the infant is only six years old, but believe they should accumulate as much income as possible while the infant's educational requirements are few, in order to spend the money more advantageously when the infant is older. The general guardian contends that the will gives the trustees no discretion in regard to the amount to be expended, or the manner of expenditure of the net income, and that the accumulated income now in the hands of the trustees should be paid to the infant's father as his general guardian. Whether the trustees are given discretionary power in the application of the income, or whether they must pay the income to the general guardian, to be applied by him for the use and benefit of the infant, depends upon the language of the will. (*Matter of Fisk*, 45 Misc. Rep. 298.) It is true that the words "apply" and "pay over" are considered equivalent and interchangeable in an inquiry as to the validity of a trust provision of a will. (*Moore v. Hegeman*, 72 N. Y. 376.) There is a vital distinction, however, between a direction to "pay" and to "apply," when the manner of expenditure is at issue and where there is a question as to whether the trustees or the general guardian should apply the income. This distinction is clearly and accurately stated by Mr. Surrogate KETCHAM in *Matter of Connolly* (71 Misc. Rep. 388). The language of this will is "to pay the net income." These words do not invest the trustees with any discretion. They import a gift of the income to the infant, and must be construed as a mandatory direction to pay the income to the infant. The only manner in which the income may be ordered paid to the infant is by payment to his general guardian, who is under ample

bond. I do not find any holding a contrary view. In *Matter of McCormack* (40 App. Div. 73; *affd.*, 163 N. Y. 551), the will directed the trustees to "*apply*" the income for the benefit of the infant, and the court held that the trustees were given power to withhold some of the income. With the distinction in mind between "*pay*" and "*apply*," it is plain that this case is not an authority in favor of the contention of the trustees in this application. I am therefore of the opinion that under the language of the will the net income now in the hands of the trustees must be paid to the general guardian of the infant, to be expended by him for the education of the infant under the order of the court.

Decreed accordingly.

Matter of the Estate of JAMES NEIL, Deceased.

(*Surrogate's Court, New York County, May, 1915.*)

WILLS—OLD AGE NOT DISQUALIFICATION IN A TESTATOR—WHEN WILL ENTITLED TO BE ADMITTED TO PROBATE.

Old age is not *per se* a disqualification in a testator.

In testamentary causes the burden of proof on an issue of undue influence is on the contestant.

After probate of a testamentary paper has been refused on the ground that it was not proved to the satisfaction of the surrogate an earlier testamentary paper executed by decedent when he was over eighty years of age, about two and one-half years prior to his death, with precise regard for statutory requirements, was offered for probate. Of the four subscribing witnesses three were lawyers of experience one of whom had known the decedent upwards of forty years and the evidence was convincing that said instrument was the voluntary act of a free and capable testator. *Held*, that the instrument was entitled to be admitted to probate.

A motion to dismiss the proceedings for the probate of said instrument as decedent's last will on the ground that by the terms of the later alleged will, which was refused probate as not well executed, the earlier instrument was revoked is not entitled to weight.

PROCEEDINGS upon the probate of a will.

Blandy, Mooney & Shipman, for proponent.

Frank H. Field, for contestant Alfred Neil.

Charles D. Ridgway, for contestant Mrs. Taylor.

Frank H. Richmond, for contestant James Neil.

H. A. Callan, for contestant Virginia Lockwood.

William Allen, special guardian.

FOWLER, S. — This is a contested probate proceeding. The earlier testamentary paper propounded as the last will and testament of James Neil was executed by the decedent on the 11th day of March, 1912, two years and a half prior to his death. Objections to its probate have been filed on behalf of all the children of the decedent, who allege that the testator lacked testamentary capacity and was unduly influenced by the proponent, Mrs. Neil, the widow and sole legatee. Probate of a later testamentary paper was refused as it was not proved to the satisfaction of the surrogate. This conclusion relieved the case of some very serious questions concerning its revocation, which might have proved awkward to the parties concerned in the alleged revocation. The earlier instrument now offered for probate was executed with precise regard for the statutory requirements. Of the four subscribing witnesses three were lawyers of experience and one, at least, had known the decedent for upwards of forty years.

Upon the hearing evidence was offered on the part of the contestants in support of the allegation that the decedent was unduly influenced in the execution of his will. This evidence

was most liberally received. The testator, at the time he executed the paper propounded, was about eighty-four years of age. Old age is not *per se* a disqualification. Some time before 1912 testator had been obliged, by the advance of years, to intrust the active management of his business affairs to his wife, who was many years his junior. It appears that Mrs. Neil, who was accustomed to accompany her husband when he went from home, did so on the day on which the decedent entered the law offices of the subscribing witnesses for the purpose of making his will. But it appears affirmatively that the proponent took no part in the preparation of the testamentary instrument now propounded, and was not present at its execution. The will offered for probate in this proceeding remained, after its execution, in the custody of the lawyer who drew it, and was not seen by the proponent until it was delivered to her after the decease of Dr. Neil. In testamentary causes the burden of proof on an issue of undue influence is on the contestant. (Matter of Kindberg, 207 N. Y. 221; Matter of Hermann, 87 Misc. Rep. 486; Matter of Falabella, 139 N. Y. Supp. 1003.) Without going at length into the unhappy and confused proofs bearing on the domestic life of the decedent and his family, I feel, after a careful consideration of the evidence given in this proceeding, that the contestants have not met this legal requirement.

A paralytic stroke sustained by the testator about six months before the execution of his will had doubtless impaired his usefulness, but the proofs adduced establish a decided improvement in the mental and physical condition of the testator at the time the instrument now offered for probate was executed. That his physical and mental equipment were not vigorous at his advanced age is apparent, but that these natural defects amount in this case to what is, in law, lack of testamentary capacity is not established. The evidence offered on both sides is voluminous, but a careful consideration of the whole case

presented convinces me that the instrument offered for probate in this proceeding was the voluntary act of a free and capable testator. Owing to the great number of counsel engaged the evidence is somewhat confused and the rules of evidence were not strictly applied. But I have disregarded all testimony in conflict with section 829 of the Code of Civil Procedure.

There is a point already adverted to in connection with this proceeding that calls for additional explanation. A later alleged will dated May 21, 1914, was first brought on for probate, and after a hearing probate was refused. A motion to dismiss this present proceeding was made before me on the hearing on the ground that, by the terms of the later alleged will, the paper offered herein for probate was revoked. Without detailing the circumstances surrounding the preparation and execution of that later paper I want to make it plain that I never considered it well executed or valid as a revocation. There is therefore no weight to the contention that the instrument, which I find must be admitted to probate in this proceeding, had been revoked by the alleged subsequent will.

Probate decreed.

Matter of the Estate of SARAH W. KATHAN, Deceased.

(*Surrogate's Court, New York County, May, 1915.*)

WILLS—REVOCATION OF—WHAT ARE SPECIFIC LEGACIES—PROVISIONS AS TO LAPSE OF CERTAIN BEQUESTS.

Legacies of a certain clustered diamond ring and a remainder interest in a certain table-cloth and of a certain long diamond chain are specific legacies.

Where testatrix in a separate clause in the same paragraph by which she made such specific legacies bequeathed her remaining jewelry in the following order: to her husband any one piece which he might select, he to have first choice; to another any one remaining piece of said jewelry the legatee to have eleventh choice, and a codicil revoked a legacy of any

one remaining piece of said jewelry given to one who was to have second choice, a gift of the remainder of testatrix's jewelry and other articles of personal use, together with her silverware, to her executors with request that they give the same to such friends of testatrix as they might select, refers solely to jewelry remaining after the payment of the specific legacies and the several legatees had made their choice from the "remaining jewelry," and under it legacies which have failed because of the revocation by the codicil did not pass.

Where a will provides that should certain bequests lapse or fail for any reason such bequests should go to and form part of the residuary estate and be disposed of in accordance with a clause naming a certain person as sole residuary legatee, he takes the lapsed legacies.

A bequest of all furniture, pictures except family portraits and certain furniture subsequently mentioned and contained in the residence of testatrix includes the rugs, draperies and furnishings of said residence which were not specifically disposed of by the will.

PROCEEDINGS under section 2615, Code of Civil Procedure, to construe the will of testatrix.

Cadwalader, Wickersham & Taft (Francis Smyth, of counsel), for Henry W. Butler.

Bergen & Prendergast (James W. Prendergast, of counsel), for Herbert L. Smith, executor under will of Sarah Kathan.

Thomas A. McGrath, for Earle Scott, executor under will of Sarah Kathan.

Greene, Hurd & Stowell, for Mary Burnett Hurd.

Egerton L. Winthrop, special guardian of the infant Therese Quanz et al.

FOWLER, S. — This is a proceeding under section 2615, Code Civil Procedure, to construe the will of testatrix, which was admitted to probate by this court on June 7, 1913. Letters testamentary were granted to the petitioners, who have paid

over and delivered all the legacies bequeathed under said will, excepting those as to which questions have arisen, due to the presence in the will of certain provisions which it is alleged are doubtful in meaning and admit of two or more constructions.

At the time testatrix's will was offered for probate the proponents propounded several torn sheets of paper purporting to be a codicil to said last will and testament. The probate of the alleged codicil was contested. After a hearing the will was admitted to probate, and probate of the codicil refused (141 N. Y. Supp. 705.) Accordingly the decree entered admitting the will to probate provided that, although the codicil had been revoked by the testatrix *animo revocandi*, it was genuine and had been duly executed. The codicil was given effect in so far as it revoked certain provisions in the will, and the will so modified was admitted to probate.

The questions which occasion this application for construction relate to the second, third, fourth and fifth paragraphs of the will of testatrix.

Under paragraph 3 of the will there was bequeathed to Adele Sibley Cootes a certain clustered diamond ring and an interest in remainder in a certain table-cloth; to Adele Sibley Cootes and Alice Sibley Whann a certain long diamond chain. These legacies were specific legacies (*Crawford v. McCarthy*, 159 N. Y. 514, 519), and were all revoked by the codicil.

After making the several specific bequests in the initial clauses of paragraph 3 as indicated testatrix adds in a separate clause in the same paragraph the following:

"I give and bequeath my remaining jewelry to the persons hereinafter in this clause of my will named and in the following order, viz.:

(1) To my husband, Reid A. Kathan, any one piece of my remaining jewelry which he may select, he to have the first choice. * * *

(11) To Margaret A. Finch, any one remaining piece of my jewelry, she to have eleventh choice."

The codicil also revoked a legacy to Alice Sibley Whann of "any one remaining piece of my jewelry, she to have second choice."

In the closing clause of the third paragraph of the will testatrix added a residuary clause, as follows:

"All the rest, residue and remainder of my jewelry and other articles of personal use and adornment, together with my silverware, I give and bequeath to my executors hereinafter named, with the request that they shall give and divide the same to and among such of my friends as they may select and see fit to bestow the same upon."

This residuary clause I find refers solely to whatever jewelry remained after the payment of the specific legacies and the several legatees had made their choice from the "remaining jewelry." The restricted residuary clause is limited, as indicated, and is not capable to pass the legacies which have failed because of the revocation of the codicil. (*King v. Woodhull*, 3 Edw. Ch. 83; *Kerr v. Dougherty*, 79 N. Y. 327, 345.)

The fifth paragraph provides as follows:

"Fifth. Should any of the gifts and bequests made by me in the first, second and third paragraphs of this my will lapse or fail for any reason, I direct that the bequest so lapsing or failing shall go to and form part of my residuary estate and be disposed of under and in accordance with the provisions of the fourth paragraph of this my will."

The fourth paragraph of the will makes Henry W. Butler the sole residuary legatee. The fifth paragraph of the will is definite in its provisions, and was expressly intended by testatrix to intercept from intestacy any legacy or bequest which would have lapsed or failed for any reason. The specific legacies revoked by the codicil pass therefore to Henry W. Butler under the fifth paragraph of the will, the purport and

intent of testatrix being to substitute Mr. Butler as the legatee in each instance of failure or lapse.

Another question concerns the significance of the term "furniture" in paragraph 2 of the will. Paragraph 2 reads in part as follows:

"I give, devise and bequeath to my trustees hereinafter named * * * also all furniture, pictures, except family portraits and certain furniture hereinafter mentioned, contained in my residence in New York City."

Testatrix left certain rugs, draperies and furnishings in the apartment which she occupied at the time of her death. These chattels were not specifically disposed of by her will. It is to be noticed that the disposition of the household furniture contained in the country house at Oyster Bay and disposed of by the first paragraph of the will plainly segregates that particular property from the rest of the personal property of the testatrix, and this whether the same is of like character or otherwise.

The question here is whether the term "all furniture" includes the rugs, draperies and furnishings of testatrix's apartment in New York city. The disposition of testatrix's furniture under paragraph 2 is general and comprehends whatever is classed as furniture. The authorities tend to attach a broad meaning to this term so as to include in a general bequest of furniture such as this all that goes to furnish an abode. By the term "household furniture" all personal chattels are included which contribute to the use or convenience of the householder and to the ornament of the house, as plate, linen, china, both useful and ornamental, and pictures. (*Kelly v. Powlett*, *Ambl.* 605; *Bunn v. Winthrop*, 1 *Johns. Ch.* 329.) Generally a bequest of "furniture" means the same as one of "household furniture." "Household property" in testator's house has been held to include the fuel in a house and a gun which might be used for defense. (*Matter of Frazer*, 92 *N. Y.* 239.) I will hold, therefore, that the term "all furniture" in the

second paragraph of the will comprehends and includes the rugs, draperies and furnishings contained in testatrix's apartment and pass to the executors as trustees.

In the third paragraph of the will testatrix bequeathed a gold purse and aqua marine chain to Mrs. Carlie W. Sibley, who predeceased her. The question of the disposition of these lapsed legacies was not propounded by the petition, but counsel have intimated a willingness that the surrogate pass upon the disposition of these two bequests. Without saying more, I think that in view of my opinion, already expressed, these lapsed legacies pass under paragraph 5 of the will to Mr. Butler.

Decreed accordingly.

Matter of the Probate of the Last Will and Testament of
PATRICK DALY, Deceased.

(*Surrogate's Court, Kings County, May, 1915.*)

WILLS—BEQUESTS UNDER—NAME IN RESIDUARY CLAUSE ERRONEOUS—
DEVISE OF ALL REST, RESIDUE AND REMAINDER.

By the third paragraph of his will testator bequeathed to "Anne McGrath of Vandebilt Avenue near Atlantic Ave., Brooklyn, one hundred dollars, to Annie Farrell all my family pictures." By the next paragraph all the rest, residue and remainder of the estate was devised and bequeathed to testator's son-in-law and "Annie McGrath of 519 Greene Ave." in equal shares. *Held*, that the name "McGrath" in the residuary clause was erroneously written in the place in which the name "Farrell" should have been written and that the gift of one-half of the residue was to Annie Farrell.

PROCEEDING upon the probate of a will.

M. F. McGoldrick, for proponent.

William S. Butler, for Annie Farrell.

Walter L. Post, for Annie McGrath.

KETCHAM, S.—The portion of the will which immediately requires construction is the following:

"*Fourth.* All the rest, residue, and remainder of my estate of every name and kind soever I give devise and bequeath to my son-in-law James Coughlin and Annie McGrath of 519 Greene Ave., in equal shares."

In the third paragraph of the will there were the following gifts: "Anne McGrath of Vanderbilt Avenue near Atlantic Ave., Brooklyn, one hundred dollars, to Annie Farrell all my family pictures."

The precise question is whether or not the gift of the residue is to Anne McGrath or to Annie Farrell.

Anne McGrath and Annie Farrell were both persons in existence when the will was made. Both were within the knowledge of the testator. Both were held by him as acceptable objects of his testamentary bounty and, as seen above, both were named in his will as beneficiaries under provisions not involved in the present uncertainty.

Anne McGrath lived in Vanderbilt avenue, near Atlantic avenue; Annie Farrell resided at 519 Greene avenue in the house which the testator owned and in which he lived.

The testator knew the residences of both of them. The instruction which he gave to his draftsman was that the will should bestow one-half of the residue of the estate upon Annie Farrell, and he accompanied this instruction with the statement that she lived at 519 Greene avenue.

The name "McGrath" in the residuary clause was written in error in the place in which the name "Farrell" should have been written.

These facts were the proper subject of evidence and there is no ground for questioning their existence.

There results a typical case of latent ambiguity, for in the unexplained words of the will there is a legacy which cannot be paid without setting at naught one or the other of two expres-

sions employed by the testator for the purpose of identifying the legatee.

Where the residence of a proposed legatee is well known to the testator and, especially, if the residence indicated in the will as descriptive of the legatee is the established place of abode both of the testator and the intended legatee, the residential description is no less forcible as an indication of the beneficiary whom the testator has in mind than is the use of a proper name.

If in this case the written name shall control, then the legacy will become payable to one who does not live at 519 Greene avenue; if it be held to be payable to one who lived at that place, then it must be paid to one who does not bear the name.

The dilemma is beyond escape. Either those repugnancies must be reconciled, or the legacy must be torn in two while they contend in equal match.

Not only is a construction to be adopted which will avoid intestacy, but, more important, the provision in question must not be allowed to fall into absolute ruin and absurdity.

One thing must be confessed. The testator did not intend that his attempted gift should be destroyed by the very balance of his own equivocation. He meant his gift for Annie Farrell and used language in his will, which, standing alone, recorded this purpose. True, he also used a name which, standing alone, would deny this purpose.

In this duplicity of his expression, a construction based upon extrinsic evidence of his state of mind and the circumstances to which his act was adjusted will not vary his will or impose upon it a meaning not therein contained. Such construction will only determine the significance of the verbal symptoms which he employed. It will merely read the will itself, but with his mind and his vocabulary, however unconventional or cryptic his use of words may have been.

In such process the meaning imposed upon the instrument

will only be that which is found within it, and neither the process nor the result will be the less accurate or lawful, because the light of circumstances is turned upon the written page, or the testator's conception is used as the key to that which he has hidden.

This has been done in many cases which in their application to this case will not be stretched from the principle which they teach, though no case has been found in which the name used to designate the beneficiary was not the name of the person intended but was the name of another who was within the zone of the testator's general regard. (See Wigm. Ev., §§ 2471-2477, and especially the notes to the text as follows: § 2474, n. 1; § 2477, n. 5, 7; Redf. Surr., § 247, and cases cited.)

Under these authorities it will be found that the gift of one-half of the residue was to Annie Farrell and not to Annie McGrath.

Decreed accordingly.

Matter of the Petition of JOSEPH MOSTOFSKY to Prove the Last Will and Testament of HARRY HERMAN, late of the County of Kings, Deceased.

(*Surrogates Court, Kings County, May, 1915.*)

MOTIONS AND ORDERS—WHEN INTERLOCUTORY ORDER IS NOT RES ADJUDICATA—MOTION TO DISMISS OBJECTIONS FILED TO PROBATE DENIED.

Ordinarily, an interlocutory order in an action is not *res adjudicata*.

A decision of the Appellate Division, reversing an order granting alimony and counsel fees in an action for a separation upon the ground that the alleged marriage between the parties is void, is not conclusive on the plaintiff in said action in a proceeding to probate the will of her alleged husband, and a motion to dismiss objections filed by her to the probate of his will on the ground that the decision of the Appellate Division was *res adjudicata* on the question of marriage must be denied.

PROCEEDINGS upon probate of a will. Motion to strike out objections before trial.

Randolph N. Souffront, for proponent.

Alexander S. Drescher, for Esther Lehrman, contestant.

KETCHAM, S.—Objections to the probate of the will having been filed by one claiming to be the decedent's widow, the proponent moves that the objections be stricken out before trial, on the ground that it has been decided by the Appellate Division of this department that the alleged marriage between the decedent and herself was void.

Such was the decision, but it was not made upon a trial of the issues. It was made in an action brought by the objectant against the decedent for limited divorce, and was the expression of the ground upon which the Appellate Division reversed an order granting to her alimony and counsel fee. There may have been an order entered upon the decision, but no final judgment was rendered. None was possible.

Ordinarily an interlocutory order in an action is not a conclusive adjudication. Nothing is shown upon this motion to lift the determination of the Appellate Division out of the ordinary class. A fair test of its effect readily suggests itself, by which it must appear that the order or decision was not such final adjudication as would prevent a re-examination. If the order be not a final adjudication, in the sense that it stops any renewal of the controversy affected thereby, it would have had the same character and force in that action.

It would not have been a bar to the determination of the status of the parties thereto, if one of them had insisted upon a trial of the issues involved in the action in which the order of the Appellate Division was made. Clearly, if it could not be put in evidence against the alleged wife upon the trial of that action it cannot be availed of to conclude her in this proceeding.

Motion denied.

In the Matter of the Judicial Settlement of the Account of Proceedings of ROBERT LLOYD and CHAUNCEY L. GILES, as Executors, etc., of WILLIAM GIBSON, Deceased.

ESSIE KATE GILES, Appellant; ROBERT LLOYD and CHAUNCEY L. GILES, as Executors, etc., and Others, Respondents.

(*Supreme Court, Appellate Division, First Department, January 15, 1915.*)

WILL—PREFERRED LEGACY—INTENT OF TESTATOR—EVIDENCE—EXTRANEOUS FACTS.

The question as to whether a testator intended to prefer a certain legacy over others, so that it should be paid in full and the others abate *pro rata* where the assets are not sufficient to pay all, may be determined not only from the terms of the will itself, but also from extraneous circumstances, including the testator's relations with and conduct toward the legatee.

Thus, an intent to prefer such legacy may be found where the testator, a bachelor, treated the legatee as his child during his lifetime, and provided her with a home without cost after her marriage, and promised thereafter to provide her a permanent home, which should go to her issue should she not survive him, and he differentiated such legacy from other legacies in that he ordered it to be paid within a year.

LAUGHLIN, J., dissented.

APPEAL by Essie Kate Giles from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 1st day of December, 1914, sustaining exceptions to the report of a referee herein and remitting the proceeding to the referee for further hearing.

Edward P. Lyon, for the appellant.

Lawrence S. Coit and Winter Russel, for the respondents Denton and Clark.

Order reversed and exceptions to referee's report overruled on the opinion of the referee, and the matter remitted to the

Surrogate's Court to enter a decree in accordance with the referee's report, with costs to both parties and the special guardian payable out of the estate. No opinion. Order to be settled on notice.

Present — INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN, SCOTT and DOWLING, JJ.; LAUGHLIN, J., dissenting.

The following is the opinion of the referee:

HENRY W. JESSUP, Referee.— The executors of the last will and testament of William Gibson, deceased, have filed their account, which is a final account, showing a balance of \$5,775.31. There was offered in evidence before me their accounting, had in August, 1913, which was an intermediate accounting, and which fully disclosed the obligations and various liens upon the property of the decedent which had arisen or been created long subsequent to the making of his will, which was dated in 1888, and had caused a very substantial shrinkage in the quantum of the estate. Accordingly, the balance above specified is totally insufficient to carry out the provisions of the will, making pecuniary bequests amounting to some \$38,000.

To this account an objection was filed by Essie Kate Giles, beneficiary named in the 3d paragraph of the will, claiming that her legacy of \$15,000 was a preferred legacy. The special guardian appointed for an infant legatee filed objections attacking the propriety of certain disbursements and averring that the executors had not accounted for all the assets of the estate. All the persons interested appearing on the hearings before me other than Essie Kate Giles took issue with her contention that she was entitled to a preference, and, in view of the determination I have reached, the consideration of the other objections becomes immaterial, because, as the parties in whose behalf they were filed will not, in the view I take in the case, be entitled to any distributive share, I deem it unnecessary to pass

upon the propriety of the charges for which vouchers have been duly filed and to which the special guardian made objection because Essie Kate Giles, to whom distribution will be made if the view I take of the law be correct, has not objected to the propriety of these items and her counsel did not require any justification of their reasonableness.

In support of the contention that the legacy to Essie Kate Giles is a preferred legacy, the following considerations are urged, which I may reframe as follows:

1. The language of the will as expressing a clear and explicit testamentary intent.

2. Proof of extraneous circumstances with regard to the legatee's relationship to and dependency upon the testator at the time of making the will and from that time until his decease.

3. The order of the legacy in the will as illuminating the question of intent to prefer.

4. Certain *cancelli* or marks which upon the probate of the will were shown to have been made by the testator but found by the surrogate in admitting the will to probate to have been not so made as to effect a revocation of the particular parts sought to be canceled, but presumably to be merely evidences of a revocatory intent not actually effectuated by the making of a new will; not an act of revocation sufficient to comply with the statute; * so that the whole will was admitted to probate. A copy of the will showing these marks or *cancelli* and also showing notes by the testator indicating the reason for making these cancellations in certain cases, namely, that the particular legatees were dead, was offered in evidence and is submitted with this report.

Careful briefs have been submitted and I have given to the cases discussed in opposition to the claim of preference careful consideration. And in view of the fact that however small

* See 2 R. S. 64, § 42; now Decedent Estate Law (Consol. Laws, chap. 13; Laws of 1909, chap. 18), § 34.—[REP.]

their abated shares would be, a considerable number of legatees will receive nothing whatever, if my view of the law be correct, I have deemed it necessary to write a short memorandum stating my reasons for the conclusion I have reached.

The only effect that I can attribute to the *cancelli* upon the will as it was admitted to probate is merely that the testator at the time these marks were made (whenever that was) intended that these particular legacies should not operate upon his decease, but enough of these pecuniary legacies were left (assuming that the others had been held to be revoked) to present exactly the same question, namely, are they not all general pecuniary legacies, and, therefore, under the rule, must they not all abate ratably? For it is obvious that no construction of the will, however forced, could create a specific legacy to Essie Kate Giles out of the 3d clause. Since the *cancelli* already decreed to have no revocatory effect throw no light upon the intent of the testator to prefer the legacy to Essie Kate Giles over the other pecuniary legatees, the considerations remain as to whether the language of the will with proof of the extraneous circumstances show such a clear and explicit intent that at all events Essie Kate Giles must be paid, and differentiates her legacy from the others, which, of course, come within the general rule that they are "mere bounty." If we take the provision that the legacy shall be paid within a year alone, we must recognize the rule as having been long established, and by authority which cannot be disputed or overruled, that such a preference in point of time of payment does not affect the operation of the rule if later it transpire that there is a deficiency of assets. It may be that the executor has complied with the direction of the will and has prematurely paid, and it may be also that he failed to exact a refunding bond, but as between legatees the rule still operates that they must abate ratably, and the whole subject is carefully covered by the late Hon. DELANO C. CALVIN in *Trustees of Harvard*

College 1. Quinn (3 Redf. 514). But when the legacy to Mrs. Giles is differentiated from the other legacies by this direction to pay before the statutory time * and no such provision is made in regard to these other legacies, while that consideration alone cannot have the effect claimed on behalf of Mrs. Giles, yet it is certainly a material circumstance to be weighed in considering the general intent to prefer, asserted to have been in the mind of the testator.

Now this intent to prefer is based upon two considerations, the one that Mrs. Giles stood to the testator in what is described in the Transfer Tax Law† as the mutually acknowledged relation of parent and child. It was proved that she became an orphan when she was between two and three years old; that he promptly took her into his home, which was presided over by a maiden sister, he himself being a bachelor; that she grew up as his child; that he maintained and educated her and that she was married from his house. All the circumstances that were testified to were the kind of circumstances which would be probative and determinative on the question of whether the mutually acknowledged relation of parent and child existed if this were a proceeding under the Transfer Tax Law and she were claiming exemption from its provisions under that particular definition of persons or classes exempt. That he treated her as his child; that he was responsible for her support; that she lived with him, and that this relationship of affection continued to the time of his death, in spite of her marriage, is clear upon the record before me. But the cases which emphasize this feature as tending to indicate an intent

* See Code Civ. Proc., § 2721; now Code Civ. Proc., § 2688, as amd. by Laws of 1914, chap. 443.— [REP.]

† See Tax Law (Gen. Laws, chap. 24; Laws of 1896, chap. 908), § 221, as amd.; now Tax Law (Consol. Laws, chap. 60; Laws of 1909, chap. 62), § 221, as amd. by Laws of 1910, chaps. 600, 706; Id. § 221a, added by Laws of 1911, chap. 732.— [REP.]

to prefer are all characterized by the limitation or specification that the legacy must clearly appear upon its face to be for support and maintenance, and that the legatee claiming preference is not otherwise provided for in the will. From this viewpoint it is obvious, first, that she is not otherwise provided for in the will.

But in respect to the question of support and maintenance, the testimony as to the relationship of the parties in this particular, after her marriage, becomes important, and, in my judgment, decisive. She was married from her uncle's house in 1883 and she was then about twenty-nine years old. That is to say, his support of her as a member of his household and family had continued after her majority for a number of years. Her husband was upon the stand and testified that he had supported his wife, but no particulars were entered into on direct or cross-examination as to his ability to maintain her, beyond what he had done, whereas, on the other hand, it was clearly shown that at all times since her marriage her uncle, the testator, had provided her husband and herself with a material part of their support, *i. e.*, the use, rent free, of one or another of the houses which he owned in New York city or in New Jersey. Clause 3 of the will contains a solemn statement by the testator of his oft-expressed intention to provide her a home. The witnesses who were examined testified to the existence of this intention and his various attempts (though not carried to completion) right along from the time of the making of the will and nearly up to the time of his death to carry it out; the examination of various houses, their rejection on account of locality or availability by Mrs. Giles or by the expectant donor. One house, it was testified, he rejected because at the last moment he discovered a closet full of old medicine bottles and he decided that the house could not be a healthy one to live in if the previous tenants had needed so much medicine.

And while he had made these various *cancelli* on his will,

showing a scrutiny of it after the time of its making, he did not in any way mark over or change the clause providing for Mrs. Giles. There is enough in the record to show that what he calls in the will his "oft-expressed intention" to give "her by deed a house during my lifetime" (which proposed gift by the terms of the clause he intended should inure to her issue, thus showing that his intent to give her a home was not limited to her life, but was intended to give to her estate in fee which would pass to her heirs) was in the nature of a promised gift partially performed; that the gift was not so much a promised gift of realty as a promise of purchase, that is, to provide the funds to purchase a home, which promise was, as I say, partially performed by giving her the equivalent of the use of such a home until the actual premises should be purchased, and giving it to her on terms even more favorable than ownership, because the title to the house she occupied remained in him, and he, presumably, paid the taxes and maintained the repairs thereon, while she and her husband secure the use of the home for the time being rent free. It is a generally recognized fact that the item of rent in the average household sustains the relation of one-fourth, if not one-third, to the gross household expenses of the particular family not living in tenements. So that while her husband supported her from the time she was married at twenty-nine, it was always with this material aid to the extent of at least one-fourth of the maintenance expenses of the household, in that she received, rent free, the use of a house. Assuming that the will had been silent on this subject and had contained no legacy to Mrs. Giles, it may be doubtful whether the promise to give could have been enforced against the estate, by action, unless this single ground of partial performance could have been urged in support of such a claim. But these circumstances are most material in differentiating the legacy to Essie Kate Giles from the class of "mere bounty," because general legacies, being deemed to be the

"mere bounty" of the testator, must abate ratably. If a particular legacy, while not specific, is shown by the will and by attendant circumstances not to be mere bounty but to be in discharge of a debt or to be a provision for the maintenance and support of a near relation not otherwise provided for, or to be in performance of a solemn promise, then it is clearly taken out of the class of "mere bounty" legacies and accordingly, whatever might be the result of any particular one of the considerations above weighed applied to this 3d clause of the will, in which case it well might be that any one of them taken alone would be insufficient to sustain the claim to a preference, taking them all together, it brings the case within the intent of the rule that, just as the Statute of Distribution may be set aside by a valid will, absolutely cutting off those who would otherwise share in an estate, so an administrative rule of abatement may be nullified and must be set aside if the intent of the testator to that effect is clear and explicit in the particular case. In other words, as I find in the text books and in the cases, there is no positive rule for determining whether a particular legacy is to be paid in full at all events, or whether, in case the estate is insufficient to pay the legacies contained in the will, each case will depend upon a consideration of all the material provisions of the will to be construed and of the extraneous circumstances which bear upon the question of intent. This is the rule laid down in *Pierrepont v. Edwards* (25 N. Y. 128), and the extraneous evidence which is admissible under the rule laid down in that case has been admitted in most recent cases. (See *Ely v. Ely*, 163 App. Div. 320, 334, where Mr. Justice CLARKE observes: "The extraneous evidence produced in this case, and of which the heirs at law complain upon this appeal, appears to me to have been clearly admissible as showing the surrounding circumstances and conditions under which the testamentary document was executed, the relation that the testator bore to his family, the scheme of his disposition, * * *".

It is to explain and support the will, and not to destroy it. It is the kind of evidence which, as I understand it, the Court of Appeals has many times determined to be admissible.”)

Mr. Redfield, in his work on Law and Practice of Surrogates' Courts (7th ed., § 759), says that the general rule as to legacies which the testator intended should be paid in full and at all events is that they are not subject to abatement with general legacies. This is always true when these legacies are charged, as he remarked in the text, upon a particular fund, or upon real estate; but where this is not the case, it turns upon a careful consideration of all the material provisions of the will and upon “Extrinsic circumstances which bear upon the question of intent.”

Essie Kate Giles was the only person who sustained to this bachelor testator in his lifetime the relation of child. She was practically adopted by him; she lived with him; she was dependent upon him; she married from his house. After her marriage he provided her with a home, and promised to provide her a permanent home. He intended to carry this promise into effect and repeated attempts were made to do so. He stated solemnly in his will, made shortly after her marriage, that he had oft expressed his intention to provide her a home. He amplified this intention by indicating that, if she should not survive him, her issue would have what would have provided her a home. He set a pecuniary value on the gift which he had intended to make, \$15,000. While the intention was unexecuted *inter vivos*, he at all times had given her the pecuniary equivalent for the time being of the actual deed to her of a house, plus the charges of taxes, insurance and repairs. As I consider the other general legacies, he directed that she should be immediately paid within a year, whatever might happen to the others by operation of statutory rules. In respect to none of these other general legacies is there anything that takes them out of the “mere bounty” class. All these

considerations conspire to convince me of his intent to prefer this person and to provide for her support and maintenance, though married, in this material and important respect of a home.

I have prepared a report with appropriate findings and conclusions to carry out this view of the facts.

ELIZABETH STURMWALD, Appellant, Respondent, v. EMMA F. POPPE, and Others, as Executors, etc., of EMIL POPPE, Deceased, Respondents, Appellants.

(Supreme Court, Appellate Division, First Department, February 5, 1915.)

**WILL—DIRECTION THAT BUSINESS BE CONTINUED BY SURVIVING PARTNER—
ANNUITY TO WIDOW—ACCEPTANCE OF LEGACY BY SURVIVING PARTNER—
OBLIGATION TO WIDOW—PARTIES—REPRESENTATIVES OF TESTATOR—
JOINDER OF ACTIONS.**

Where a will provided that the testator's partner should carry on the partnership business during the lifetime of the testator's wife and pay her interest on the testator's capital invested in the business and an annuity out of the profits, the balance of the profits to be retained by the surviving partner, the latter by accepting the legacy of the surplus profits accepted also the obligation to make the payments to the testator's widow.

In an action by the widow against the personal representatives of her husband's partner, since deceased, to recover sums due under the will aforesaid, she need not make her husband's representatives parties to the action, for the husband's estate had no interest in the partnership business during the plaintiff's life.

Moreover, the plaintiff may recover in one action moneys which became due from her husband's partner during his lifetime and moneys due from his estate after his death.

APPEAL by the plaintiff, Elizabeth Sturmwald, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 9th day of November, 1914, denying plain-

tiff's motion for judgment on the pleadings, after a demurrer had been interposed to the complaint.

Appeal by the defendants, Emma F. Poppe and others, as executors, from so much of said order as grants plaintiff leave to serve an amended complaint within twenty days.

George H. Taylor, Jr., for the plaintiff.

Clarence U. Carruth, for the defendants.

DOWLING, J.—Appeal from an order denying plaintiff's motion for judgment on the pleadings, consisting of a complaint and an amended demurrer thereto. The complaint alleges the following facts: Raphael Sturmwald died on April 13, 1894, leaving a last will and testament, thereafter duly admitted to probate, whereby he directed that after his death the business carried on by him and his son-in-law, Emil Poppe, in the manufacture of paper boxes "shall be carried on by my said son-in-law during the lifetime of my said wife, and that during that time he shall, in the first place, pay to my said wife interest at the rate of six per cent. per annum upon the amount of capital which I may have invested in said business at the time of my decease as shown by the books of said firm, and that he shall in the next place pay to my said wife out of the profits of said business the sum of one thousand dollars per annum, and that he shall retain the remainder of said profits for his own use and benefit — said payments to be made to my said wife in equal quarter-yearly payments, the provisions of this clause being in accordance with the partnership agreement existing between me and my said son-in-law." Testator left him surviving his widow who is the plaintiff herein. Subsequent to the probate of the will, Emil Poppe, therein referred to, accepted the terms and provisions for his benefit contained therein, and thereafter and until the time of his death carried

on the business theretofore conducted by him and Sturmwald as partners, and up to Poppe's death he duly paid to the plaintiff interest at the rate of six per cent. per annum upon the amount of the capital which Sturmwald had in the business at the time of his death, as shown by the firm's books, and also paid to the plaintiff, out of the profits of the business, the sum of \$1,000 per annum, retaining the remainder of said profits to his own use and profit, making the said payments to plaintiff in equal quarter-yearly payments, as provided in the will. The amount of capital (as shown on the firm's books) which Sturmwald had invested at the time of his death was \$10,110.47. Emil Poppe died November 20, 1913, leaving a last will and testament, whereof the defendants are executors. Since his death the defendants have been carrying on the partnership business of Sturmwald & Poppe, and have received as profits therefrom in excess of the sum of \$750. Neither Poppe nor the defendants have paid the interest accruing since October 13, 1913, nor the quarterly profits falling due January 14, 1914, and April 14, 1914, amounting to \$250 each. The quarterly interest payments due January 14, 1914, and April 14, 1914, amount to \$151.65 each. The prayer for relief is that judgment be granted against defendants for the total of such payments.

We believe that the complaint sufficiently sets forth a cause of action upon the acceptance by the legatee of the use of the interest of the testator in the copartnership and the total profits to be realized from the partnership business during the lifetime of the widow, subject to the payment to her of the interest on the decedent's capital invested therein, and of the sum of \$1,000 per annum out of the profits. The acceptance of this legacy subject to this charge imposed upon Poppe the duty of paying the charge. (*Gridley v. Gridley*, 24 N. Y. 130; *Brown v. Knapp*, 79 id. 136; *Dinan v. Coneys*, 143 id. 544.) It is urged that there is a defect of parties plaintiff or defendant, in

that the personal representatives of the testator, Raphael Sturmwald, are not made parties. But the estate of Raphael Sturmwald has no interest in this litigation, for during the lifetime of the plaintiff such estate receives nothing whatever out of the profits of the business, which are divisible only between the plaintiff and the estate of Poppe in the manner fixed by Sturmwald's will. Nor are causes of action improperly united, in that sums due from Poppe in his lifetime are joined with those payable by his representatives after his decease, for the amounts payable to the plaintiff, which are sued for here, accrued respectively January 14, 1914, and April 14, 1914, both dates being after the death of Poppe, and it is alleged that the executors of Poppe have continued the business after his death, have used the interest of the plaintiff's testator in the copartnership, and have realized profits therefrom. It is not determined what recovery plaintiff is entitled to. All that it is necessary now to determine is, that the plaintiff is entitled to some relief on the facts alleged in the complaint.

The order appealed from will, therefore, be reversed, with ten dollars costs and disbursements to the plaintiff, and the motion for judgment granted, but with leave to the defendants to withdraw their demurrer and interpose an answer within twenty days on payment of said costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and HOTCHKISS, JJ., concurred.

Order reversed, with ten dollars costs and disbursements to plaintiff, and motion for judgment granted, with leave to defendants to withdraw demurrer and to answer on payment of costs.

In the Matter of the Final Judicial Settlement of the Account of SARAH S. HOLZWORTH, as Executrix of the Estate of WILLIAM N. SLATER, Deceased.

SARAH S. HOLZWORTH, as Executrix, etc., Appellant; ABRAHAM H. SLATER and Others, Respondents.

(*Supreme Court, Appellate Division, Second Department, Feb. 19, 1915.*)

DECEDENT'S ESTATE—WILL—DELIVERY OF ASSETS TO TRUSTEE IN SPECIE—ELECTION BY REMAINDERMAN TO RECEIVE GIFT IN SPECIE—JURISDICTION OF SURROGATE—ELECTION BY TRUSTEE—STATUTORY CONSTRUCTION—EQUITABLE JURISDICTION OF SURROGATE'S COURT.

Where a will empowers the testator's widow to turn over a portion of the estate either "in specie" or after conversion into cash to a trustee to pay the income to her for life, with remainders over, and she elects to turn over the property in specie consisting of stock in a private corporation, in which the testator held a controlling interest, the surrogate has no jurisdiction to decree that the trust fund shall be delivered to the remaindermen in specie, by virtue of a consent filed by them. This, because the remaindermen are not legatees or distributees, nor have they any personal right to payment or distribution during the lifetime of the widow. Hence, they are not within section 2736 of the Code of Civil Procedure, which regulates an order by the surrogate for the delivery of specific property.

It seems, that even if the testamentary trustee could be deemed to be a distributee, such decree for a delivery in specie could not be made by the surrogate, if the trustee has not filed its consent.

It seems, however, that the consent of the trustee to such distribution, if it had been filed, would not be operative against the desire of the life beneficiary.

All general phrases in a statute must yield to particular specifications contained in the same statute.

Although section 2510 of the Code of Civil Procedure gives full equity jurisdiction to the Surrogate's Court in every proceeding that comes before it in the manner prescribed by statute, it has equitable jurisdiction only as regards the matters specified in the succeeding subdivisions of said section, that is to say, its general equitable power must yield to the statutory restrictions placed upon it.

APPEAL by Sarah S. Holzworth, as executrix, etc., from parts of a decree of the Surrogate's Court of the county of

Westchester, entered in the office of said Surrogate's Court on the 9th day of November, 1914, and also from an order entered in said office on the 7th day of December, 1914, denying a motion to vacate and set aside the said decree.

Edward R. Finch (John M. Holzworth with him on the brief), for the appellant.

William A. Davidson, for the respondents Abraham H. Slater and Mary G. Slater.

Jerome A. Peck, for the respondent Mutual Trust Company of Westchester County.

CARE, J.— There are two appeals here argued as one, one an appeal from a decree of the Surrogate's Court in Westchester county, and another from an order made by the Surrogate's Court in that county, denying a motion to set aside and vacate the decree. William N. Slater died in Westchester county, possessed of a considerable estate. He made a last will and testament, which was admitted to probate. By this will he appointed his wife, Sarah B. Slater, as his sole executrix. Evidently the decedent was very fond of his wife, for he gave her in the will one-half of his estate, and conferred upon her, as executrix, more than ordinarily full powers. After directing the payment of his debts, he gave one-half of the residue to his widow, and the other half to the Mutual Trust Company of Westchester County, to hold the same in trust and to pay over to his widow, Sarah B. Slater, during her lifetime, the full income of the corpus of the trust estate, and at her death to pay over the trust fund to his sister, Mary G. Slater, and his brother, Abraham H. Slater, in equal shares. By this will he authorized his executrix in her discretion to maintain the assets *in specie* or to convert them into cash, and to distribute them in

cash or *in specie* at her discretion, and he directed that if these assets were turned over *in specie* to the trustee for the purposes of the trust mentioned in the will, the trustee might maintain them *in specie*, without being liable in any way because they were not such investments as might be made by trustees under prevailing law, and that neither the trustee nor the executrix should be liable even for negligence in holding the assets of his estate. These assets consisted principally of 329 shares of stock in a corporation known as the Port Chester Lumber Company. The capital stock of this company was 450 shares, and the decedent owned the controlling interest therein. About five years after the death of the testator a proceeding was begun to compel the executrix to account, and an order was made accordingly. In her account she stated that she still held the shares of stock of the Port Chester Lumber Company unsold, and explained the reasons why she had not sold them. These reasons were substantially as follows: The decedent's interest in that corporation was so large that his estate had the controlling stock interest therein. The executrix was of opinion that it would be to the greater advantage of the estate of the decedent to sell this controlling stock interest in one block in order that it might command a higher price, and that she had endeavored so to do. This reason is quite intelligible. Pending the decree of the surrogate on the accounting proceeding the sister, Mary G. Slater, and the brother, Abraham H. Slater, filed a consent in writing to take their respective shares *in specie*, that is, in the stock of the Port Chester Lumber Company. The circumstances under which a surrogate may render a judicial decree settling the account of an executor or administrator and adjudge a delivery *in specie* of the assets of an estate are set forth in full in section 2736 of the Code of Civil Procedure: *

* See Laws of 1914, chap. 443.— [REP.]

“ § 2736. Id.; when specific property may be delivered.

“ In either of the following cases, the decree may direct the delivery of an unsold chattel, or the assignment of an uncollected demand, or any other personal property, to a party or parties entitled to payment or distribution, in lieu of the money value of the property:

“ 1. Where all the parties interested manifest their consent thereto by a writing filed in the surrogate's office.

“ 2. Where any legatee or distributee files a consent to accept as payment in whole or in part any specified personal property at a value to be ascertained by appraisement.

“ 3. Where it appears that a sale thereof, for the purpose of payment or distribution, would cause a loss to any infant or incompetent legatee or distributee, and the value thereof has been fixed by appraisement.

“ The value must be ascertained, if the consent does not fix it, by an appraisement under oath, made by one or more persons appointed by the surrogate for the purpose.”

I think it is evident from a reading of that section that a consent filed by the remaindermen in the trust fund created by the will of the decedent was not sufficient to confer upon the surrogate jurisdiction to decree a delivery *in specie*. In the first place, they are not legatees or distributees within the meaning of that section. Neither of them has any present right of payment or distribution. The Mutual Trust Company, as the trustee, was a distributee, but in a representative capacity, practically as a custodian. It represented not only the remaindermen, but the life tenant in the corpus of the trust fund. It filed no consent to take the trust fund *in specie*. In a case such as this, where the life tenant objects, the remaindermen may not make an election against her objection. If the Mutual Trust Company be considered as a distributee, without regard to the purposes for which it is a distributee, then, as it has not filed the consent mentioned in section 2736 of the Code

of Civil Procedure, the surrogate had no jurisdiction whatever to act as he did unless there is some other provision of the statute which confers the power upon him. Personally, I think a consent of the trustee, if it had been filed, could not have been operative against the will of those whom it represented. It is claimed, however, by the respondents that by section 2510 of the present Code of Civil Procedure the Surrogate's Court has been given full equity jurisdiction in every proceeding that comes before it, and that the surrogate of Westchester county in the case now before us had the power to exercise this full equity jurisdiction on the facts that came before him. It is, of course, true that in section 2510 of the Code of Civil Procedure * the Legislature has declared as follows: "Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows: To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires."

But this legislative declaration is followed immediately by language as follows: "And in the cases and in the manner prescribed by statute: * * * 3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee.

* See Laws of 1914, chap. 443.—[REP.]

4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate or fund."

As I understand the law of statutory construction, all general phrases in a statute must yield to a particular specification contained in the same statute. As to the subdivisions of section 2510, just quoted, the cases and the manner in which the surrogate may exercise his equitable jurisdiction are specified particularly. Where there is such a specification, it must exercise its jurisdiction in accordance with the specification. Its general equitable power must yield to the statutory restrictions upon it or directions as to it, and where the statute prescribes when and how it shall act, it cannot act otherwise than is prescribed. I think this is so well settled, even as to courts of general equitable jurisdiction, as to require no discussion.

Under these circumstances, we must reverse the decree of the Surrogate's Court of Westchester county as being without jurisdiction as to its direction to distribute the remaining assets of the estate *in specie*. The decree of the Surrogate's Court of Westchester county so far as appealed from is reversed, with costs and disbursements, as to the direction to distribute *in specie*.

JENKS, P. J., THOMAS, RICH and PUTNAM, JJ., concurred.

Decree of the Surrogate's Court of Westchester county so far as appealed from reversed, with costs and disbursements, as to the direction to distribute *in specie*. Order to be settled on notice before Mr. Justice CARR.

FANNY GARRISON VILLARD, Individually, and Others, Respondents, v. FANNY GARRISON VILLARD, as Executrix, and HORACE WHITE and CHARLES A. SPOFFORD, as Executors, etc., of HENRY VILLARD, Deceased, and Others, Respondents, Impleaded with THE FARMERS' LOAN AND TRUST COMPANY, as Trustee under the Last Will and Testament of HENRY VILLARD, Deceased, of the Trust Created by Paragraph 6th Thereof for the Benefit of HELEN VILLARD BELL and Remaindermen, and as Trustee under Said Will of the Trust Created by Paragraph 7th Thereof for the Benefit of EMMA VON XYLANDER and Remaindermen, Appellant.

(*Supreme Court, Appellate Division, Second Department, Feb. 26, 1915.*)

WILL—DUTY OF TESTAMENTARY TRUSTEE—NEGLIGENCE IN FAILING TO TURN SECURITIES INTO CASH—LIABILITY FOR RESULTING LOSS.

Where a will required the executors to set apart certain amounts in cash or securities to be held in trust by the defendant, an incorporated trust company, for the payment of two specified annuities, and further gave to the trustee power to retain in the trust fund any securities owned by the testator at the time of his death, received by the trustee for the purposes of the trust without being liable for the fact that such securities were not legally permissible for trust investments, the trustee may, nevertheless, be held liable where certain securities turned over to it by the executors so decreased in value while in its hands that it was unable to pay the annuities, if it was negligent in that it took no steps to ascertain the fact that the securities turned over were not those originally held by the testator, but had been purchased by the executors with the proceeds of securities sold by them, and took no steps to turn the securities into cash or other securities during the time that they were decreasing in value.

APPEAL by the defendant, The Farmers' Loan and Trust Company, as trustee, etc., from a judgment of the Supreme Court in favor of the plaintiffs and certain of the defendants, entered in the office of the clerk of the county of Westchester

on the 17th day of June, 1913, upon the decision of the court after a trial at the Westchester Special Term.

Charles F. Brown (Frederick Geller and Edward H. Blanc with him on the brief), for the appellant.

William H. Wherry, Jr., for the plaintiffs, respondents.

William R. Begg (Franklin W. M. Cutcheon and Charles E. Hughes, Jr., with him on the brief), for the respondents, executrix and executors, etc., of Henry Villard, deceased.

Frederic E. Mygatt, for the respondents Helen Villard Bell and Emma Van Xylander.

Raymond M. Lowes, guardian *ad litem*, for infant respondents.

CARR, J.— This action was brought in equity by the residuary legatees under the last will of Henry Villard, deceased, to procure an interpretation of some parts of the will, an accounting by the executors and an accounting by the Farmers' Loan and Trust Company of its acts as trustee of two express trusts set apart to it for the payment of annuities of two life annuitants. Every person interested in the estate was made a party to the action. There were several infant defendants represented by a guardian *ad litem*. The controversy now before us on the appeal relates particularly to the settlement of the accounts of the trustee, appellant, under which a surcharge was made against it in a sum in the neighborhood of over \$100,000 for alleged negligence on its part in caring for the amounts of the two trust funds. The trustee, the Farmers' Loan and Trust Company, is the sole appellant, and this trustee complains that there has been a practical coalition against it by all the other

parties to thrust upon it the burden of a loss for which it is not responsible legally or equitably. There are six briefs. The record appears voluminous, but the first 387 pages are devoted to the pleadings, findings, proposed findings, exceptions, etc., and there are but a little over 100 pages of actual testimony, exclusive of long documentary exhibits which fill up the latter part of the case on appeal.

Henry Villard died possessed of a very large estate, mostly in "gilt-edged" securities. His will gave several general legacies, and provided that the executors should set apart in cash or in securities two separate amounts to be held in trust by the Farmers' Loan and Trust Company for the payment of specified annuities to two specified annuitants. The funds so set apart were to be sufficient in amount to pay the specified annuities on the separate trusts, which were provided for under separate clauses of the will (6th and 7th.) This will contained a very important clause, the 24th, which seems to have given rise to this particular controversy. The clause prescribes in substance that the trustee may retain in the trust fund any securities *owned by the testator* at the time of his death, received by the trustee for the purposes of the trust, without being liable for the fact that such securities were not legally permissible for trust investments, but it also provides in detail in what classes of securities the trustee may on its own account, as trustee, make investments of the trust moneys.

A claim was presented against the executors by a person claiming a large indebtedness to him by the decedent, in an amount of several hundred thousands of dollars, and the settlement of the estate was delayed pending the compromise of this claim. In the meantime, the residuary legatees, in writing, requested the executors to sell some of the low interest bearing securities and to reinvest the proceeds, at their discretion, in certain specified securities which yielded a larger profit, and among the securities so specified were the stock of the Metro-

politan Street Railway Company and the Baltimore and Ohio Railroad Company. The executors complied with this request and sold certain securities held by the decedent and purchased 500 shares of the Metropolitan stock and 500 shares of the Baltimore and Ohio stock. It is to these last two mentioned stocks that the present controversy relates. Thereafter the executors set apart these blocks of stock as parts of the trust funds for the annuitants, the Metropolitan stock going under the 6th clause of the will and the Baltimore and Ohio stock under the 7th clause. The executors addressed to the trustee a written communication as to each trust fund, partly as follows: "In compliance with the direction contained in article sixth of the last will and testament of Henry Villard, deceased, a copy of which we have furnished you, we herewith deliver to you (specification of securities) to be held by you as Trustee for the purposes of the trust thus created," etc. There was a similar writing as to the trust created under the 7th clause of the will. On the receipt of the securities and the communications aforesaid the trustee gave receipts in writing, one for each trust, reciting the securities received and declaring that the same were "to be held by this Company as Trustees under the Sixth (or Seventh) clause of the will of said Henry Villard." This was in January, 1902. The trustee, instead of converting these securities into cash and reinvesting the proceeds in securities authorized for reinvestment under the 24th clause of the will, maintained *in specie* the Metropolitan and Baltimore and Ohio stock. In the course of years the value of the Metropolitan stock disappeared entirely, and that of the Baltimore and Ohio Railroad depreciated considerably. The annuitants failed to receive their annuities, and in this action the residuary legatees and the annuitants ask the trust company to make good the loss. The position of the trust company is that it was guilty of no negligence, that it had no actual knowledge that the securities turned over to it were not actually owned by

Henry Villard at his death; that, although it made no inquiry on this matter and obtained no information until 1912, ten years later, it was entitled to assume that the securities so coming to it were a part of Villard's estate when he died, and thus they were in the protection of the 24th clause of the will. As a final ground the appellant trustee urges that the executors, by turning over no cash but securities never owned by the testator, failed in fact to set apart or "constitute" the trust funds, and that as to the securities which actually came into its hands it never received nor held the same as a trustee, and, therefore, it has no liability to the annuitants and residuary legatees, and it asks that the executors should now be compelled to "constitute" the trust funds out of the residuary estate at the expense of the residuary legatees against whom it claims an estoppel in its favor.

The position of the respondents is that when the executors set apart the trust funds they were not obliged to pay over actual cash or to deliver securities owned by the decedent; that the trustee should have inquired whether the securities tendered by the executors were owned by the decedent; that having failed to make such inquiry, it actually accepted the tendered securities as just so much cash, at their then market value, and should have converted them into cash and invested the proceeds as provided in the 24th clause of the will. There is no evidence that the executors suppressed intentionally any information, and the trial court has so found. It is evident that in January, 1902, both the executors and the trustee considered the transaction of the setting apart of the two trust funds as entirely regular at that time. The securities at the time of their delivery had an ample cash market value which could be realized immediately by either party. The loss to the residuary legatees and the annuitants arose, not from the delivery and receipt of these securities in January, 1902, but from what the trustee did or omitted to do in regard to them in

the years following. After these securities got into the hands of the trustee, the duties of the executors as to these two trust funds were ended. When the trustee got and receipted for these securities, it could have inquired as to the origin of their possession by the executors, and if it intended to treat or consider these securities as within the protective scope of the 24th clause of the will, then an inquiry would have been but a simple act of prudence, required by the measure of care owed by the trustee in the discharge of its duties. If such inquiry had been made and the facts elicited, as concededly they would have been then, the facts being known, the executors could have turned these securities into cash and reinvested the proceeds as directed in the will. It was entitled to a reasonable time to do this, which the trial court fixed at six months. But the trustee was passive, probably from lack of prudent attention, and loss has followed, for which, as we think, it is clearly responsible. The amount at stake, the elaborate character of the main briefs and the skill and eminence of counsel invest the case with an appearance of complication and difficulty, which disappears after consideration of the truly pivotal points of the controversy.

The judgment is affirmed, with costs.

JENKS, P. J., STAPLETON and PUTNAM, JJ., concurred;
BURR, J., not voting.

Judgment affirmed, with costs.

In the Matter of the First Judicial Accounting of MINNIE J. NESTER and Others, Executors and Trustees under the Last Will and Testament of SAMUEL K. NESTER, late of the City of Geneva, Ontario County, New York, Deceased.

MONTGOMERY S. SANDFORD and DAVID S. NESTER, Executors and Trustees, etc., Appellants; MINNIE J. NESTER and Others, Respondents; LEWIS W. KEYES, as Special Guardian of HAROLD A. NESTER, an Infant, Respondent.

(*Supreme Court, Appellate Division, Third Department, Jan. 6, 1915.*)

DECEDENT'S ESTATE—EXECUTORS AND ADMINISTRATORS—ELECTION BETWEEN COMPENSATION PROVIDED BY WILL AND THAT ALLOWED BY STATUTE.

An executor to whom a specific compensation has been given by will may renounce that right within a reasonable time and elect to take the allowance given to executors by law. But such right of election may be waived.

Thus, where a will gave to executors a certain yearly salary in lieu of all commissions and they drew the same in monthly installments for over two years, receiving checks bearing a statement that they were accepted in full of executors' salaries, and they continued to draw such salaries for another three years, there was an election to take the salary provided for in the will, although they had in the meantime filed in the Surrogate's Court a renunciation of the specific compensation and an election to take statutory commissions, which fact they concealed from those interested in the estate.

SMITH, P. J., dissented, in opinion, in which WOODWARD, J., concurred in part.

APPEAL by Montgomery S. Sandford and another, two of the executors and trustees under the last will and testament of Samuel K. Nester, deceased, from parts of a decree of the Surrogate's Court of the county of Ontario, entered in the office of said Surrogate's Court on the 20th day of February, 1914, settling the accounts of the executors and trustees herein but denying to the appellants commissions as executors and trus-

tees and awarding to them only the specific compensation provided for in the will.

The notice of appeal states that the appellant executors and trustees also appeal from part of the decree "in behalf of the infant Harold A. Nester," but the special guardian takes no appeal.

This appeal was transferred from the Fourth Department to the Third Department of the Appellate Division. (See 164 App. Div. 967.)

N. D. Lapham (Daniel J. Kenefick, of counsel), for the appellants.

Lansing G. Hoskins, for the respondents Minnie J. Nester and others.

W. Smith O'Brien, for the respondent Rose W. P. Nester.

Lewis W. Keyes, for the respondent Harold A. Nester, an infant.

HOWARD, J.—Samuel K. Nester died January 10, 1908. The appellants and several other persons were appointed executors of his will. The executors, other than the two appellants, were members of the family of the deceased, that is, they were his wife and his children. The testator directed in a codicil to his will that none of his executors should receive any compensation except the appellants here, and as to them the codicil provides: "Except that Montgomery S. Sandford shall receive an annual salary of One thousand Dollars, and that David S. Nester shall receive * * * an annual salary of Fifteen Hundred Dollars. The above salaries to be in full for all commissions or salaries as executor or trustee." The appellants and three others of those who were appointed executors qualified

and have all acted as such continuously up to this time. A few months after the will was probated an action was brought in the Supreme Court by certain members of the family for a construction of the will. This action did not terminate until March 15, 1910, at which time a decision was rendered (see *Nester v. Nester*, 68 Misc. Rep. 207) sustaining the will generally but holding invalid certain provisions thereof, among which was a provision that the executors and trustees should pay to the widow the sum of \$3,000 per year during her life. From the time of their appointment and up until May 10, 1910, each of the appellants drew regularly each month one-twelfth of the annual salary given to him in the will; that is, David S. Nester drew \$125 each month and Montgomery S. Sandford drew \$83.33 each month. About two months after the decision of the Supreme Court holding invalid the annuity to the widow, the appellants filed in the office of the surrogate a written paper purporting to be a renunciation of the specific compensation given to them by the will and electing, in lieu thereof, to take for their services the commissions allowed by law. They did not cease, however, to receive the specific compensation, but continued as before to take out of the funds of the estate their salary each month. The appellants were the two executors having the active management of the estate and the checks for these salaries were made out by the appellant Nester. They were signed by Nester and by the appellant Sandford. A few of them were signed by one of the other executors. At the time the appellants filed their written renunciation they did not inform their coexecutors, either in consultation or otherwise, of their purpose to renounce the specific compensation and demand the commissions allowed by law. In fact they concealed, and intended to conceal, and they admit that they intended to conceal, from their coexecutors and the other persons interested in the estate their purpose to renounce. Previous to the alleged renunciation there appeared on each check these words: "This

check is accepted in full settlement of the following account. Ac. Executor's Salary." After the attempted rehunciation, Nester, who prepared these checks, substituted in place of the words "Ac. Executor's Salary" the words "Ac. Executor's Coms." And in the books of the company kept by Nester he substituted the abbreviation "Coms." for the word *salary*. At the judicial accounting in September, 1913, the appellants first made known their purpose to demand commissions as executors and as trustees. The amount in dispute is very large and substantial, the total amount of the commissions demanded by the two appellants being \$69,102.48. The salary which has been paid to them up to the time of the accounting, covering the same period, is \$13,899.83.

An executor has a right within a reasonable time to renounce the specific compensation given to him by the will and elect to take the allowance given to him by law. (Code Civ. Proc., § 2730, as amd. by Laws of 1905, chap. 328; now Id., § 2753, as amd. by Laws of 1914, chap. 443.) These appellants attempted to renounce about two years and four months after the probate of the will. This was not an unreasonable time to wait before announcing their determination, providing that nobody's interests were jeopardized by their failure to reach a conclusion sooner. (Matter of Arkenburgh, 38 App. Div. 473.) But it is contended that, in the meantime, the appellants had waived the commissions allowed by law and had elected to accept the specific compensation provided in the will. Many decisions have been called to our attention holding that the intention of an executor to waive a statutory right need not necessarily be proved by express declarations, but may be shown by the acts and conduct of the parties. It is unnecessary for us to note such cases here or quote from those opinions for the soundness of the proposition is too apparent to need either precedent or argument to establish it. We are fully of the opinion from the facts presented in this case that these two executors did elect to

accept the specific compensation provided in the will instead of the allowance made by law. This election, we believe, was made at the time the appellants qualified and assumed the duties of their offices, and that they continued of this mind for a considerable period thereafter is perfectly apparent. Just at what juncture they changed their minds is not so certain, but that is not of much importance.

But it is contended by the appellants that there was no election here for the reason that an election cannot be made until the person electing has full knowledge of the facts necessary to enable him to make an election; and in this case they say that they did not have full knowledge of the facts until the decision of March 15, 1910, which cut off the annuity to the widow, thereby abbreviating their terms of office. But this assertion seems to have little force, for very soon after these appellants assumed their offices, and more than two years before the decision was rendered, the widow had by written instrument surrendered her annuity. The appellants were fully aware of this; they recognized the validity of this surrender and acted upon it. The circumstances of the Supreme Court decision cannot, therefore, be held to relieve the appellants from the election which they had previously made.

The appellants elected; there can be no doubt about that. Afterwards they attempted, or at least indicated a wish, to renounce their election; but in this they seem utterly to have failed. In writing, they pretended to renounce the specific compensation; in fact, they did not renounce it at all, but continued to accept it. Had they come out boldly after the Supreme Court decision, and after filing their written renouncement, and taken the position that they had previously been deceived, thinking that their terms of office were to be continued much longer, previous to the decision, than they were to be under the decision, and that they had acted, therefore, in ignorance of all the facts their position here would be much improved.

They took no such frank and open position, however, but clung to their monthly salary with the same tenacity that they had clung to it before. They did not renounce; they only said that they had renounced. What they did amounted neither to a renunciation of their previous election nor the specific compensation.

Their whole attitude in this matter does not commend itself to the court. If they had concluded to renounce their specific compensation upon the rendition of the Supreme Court decision, assuming that they had a right to do so then, it was their duty to make their intention known. Their dealing in this particular with their coexecutors, and with the persons interested in the estate, was not open and fair and above board, as the law requires executors to act, and as it is assumed that honorable men will act; they were resorting to stealth and cunning to carry their point. They concealed their purpose to attempt to get a large amount of money from the estate in excess of what the testator had willed them to have for their services; and, while harboring such a purpose, one of the appellants bargained with his coexecutors for extra pay for his services as bookkeeper. Had his associates known of his purpose to attempt to get this large sum of money in commissions they would not, it may be assumed, have agreed to the fifteen dollars per week extra compensation which they voted him. In order to get this extra pay this executor stated that his salary under the will was too small, but even at that time his purpose to demand commissions instead of the salary had been fully matured in his mind. Such maneuvers, if resorted to in the business world, would breed distrust and drive away that "confidence" on which business men so much rely and on which Mr. Sandford as a banker relies.

It is our conclusion, *first*, that these appellants, with full knowledge of the facts, elected to accept the specific compensation given to them by the will of the testator; *second*, that they attempted to renounce this election but failed; *third*, that they

are not entitled to the commissions allowed to executors by law, and that the only reward for their services which they are entitled to is the specific compensation provided in the will.

The decree should be affirmed, with costs.

All concurred, except SMITH, P. J., dissenting in opinion, in which WOODWARD, J., concurred, except as to the views expressed in reference to the case of Matter of Arkenburgh (38 App. Div. 473).

SMITH, P. J. (dissenting): An irrevocable election, as I read the authorities, implies a deliberate selection between two known alternatives. After an election has been made if the apparent situation is materially changed that election may be revoked, if such revocation works no harm to other parties. In 15 Cyc. 262 (note), in speaking of this rule, the editor says: "Knowledge is not to be imputed as a matter of legal obligation, as the doctrine of election is not properly a rule of positive law, but a rule of practice in equity. 'In order that a person who is put to his election should be concluded by it, two things are necessary. First, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them. Second, an intention to elect manifested, either expressly, or by acts which imply choice and acquiescence.' Spread v. Morgan, 11 H. L. Cas. (Clark's) 588, 615; 11 Eng. Reprint, 1461, per Lord CUMMERBURY." In Story's Equity Jurisprudence (Vol. 2 [13th ed.], § 1097) the author says: "Before any presumption of an election can arise, it is necessary to show that the party acting or acquiescing, was cognizant of his rights. When this is ascertained affirmatively, it may be further necessary to consider whether the party intended an election: * * * whether he can restore the other persons affected by his claim to the same situation as if the acts had not been performed, or the acquiescence had not existed; and whether there has been such a

lapse of time as ought to preclude the court from entering upon such inquiries, upon its general doctrine of not entertaining suits upon stale demands, or after long delays." In section 1098 the author further says: "Questions have also arisen in Courts of Equity, as to the time when, and the circumstances under which an election may be required to be made. The general rule is that the party is not bound to make any election until all the circumstances are known, and the state, and condition and value of the funds are clearly ascertained; for, until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice. If, therefore, he should make a choice in ignorance of the real state of the funds, or under a misconception of the extent of the claims on the fund elected by him, it will not be conclusive on him." Under the rule of law as thus stated, the decision of Mr. Justice FOOTE (see *Nester v. Nester*, 68 Misc. Rep. 207) declaring certain of the trusts in the will void, presented to the executors a new state of facts, which gave to them the right to revoke their election theretofore made, and this they promptly did. Since such revocation they have done nothing inconsistent with their expressed intention to claim the commissions due under the law. Their taking of their salary prior thereto has in no way affected the interests of any other party to the contest. No action has been taken by any other person connected with the estate upon the faith of their having elected to take the salary due under the will. It is contended that under the will the executors have the power to remove one of their number for any misconduct in the execution of the duties of such executor, and that this power might have been exercised had the other executors known of the election to take the commissions provided by law. But such conduct is clearly not within the purview of the will as authorizing their removal as executors. It is further claimed that one of the executors was given a salary for keeping the accounts, which would not

have been given to him had it been known that he had elected to take the commissions provided by law. But the duties thus performed were not executorial duties. They had the clear right to hire such services, and the money paid to this executor therefore was the exact sum which had been paid to the party who had theretofore kept the accounts.

These executors have apparently been denied the right of election for two reasons. *First*, because from the beginning they have drawn from the estate monthly the amounts named as their salaries under the will; and, *secondly*, because they have concealed from others interested in the estate the fact that they had elected to take the commissions allowed by law. The receipt of the salary allowed by the will was consistent with the fact of their election to take such salary prior to the decision of Mr. Justice Foote, which changed the situation and rights of the trustees materially. Thereafter the monthly allowance was taken not as salary, but on account of commissions, and there can be no claim that they ever intended by such acts to waive their right to legal commissions. As far as the trust funds were concerned, they were required to take out their commissions before handing over the trust income to the beneficiaries. Otherwise they would have been deemed to have waived the rights to such commissions. (*Olcott v. Baldwin*, 190 N. Y. 99.) The fact that instead of reckoning each month upon just what commissions were payable upon the payments made to the beneficiaries, they took from the funds the amount provided by the will, prejudiced no one and may be fully compensated, if need be, by charging interest upon the amounts improperly taken at that time. Confessedly, the moneys that have been drawn from the estate are very much less than the commissions allowed by law. The fact that these trustees concealed from others interested in the estate that they had made their election to take the commissions allowed by law, is in no sense a legal fraud, nor, in my judgment, are these executors

subject to the criticism in the prevailing opinion for having committed any ethical wrong. They were working harmoniously in connection with the other executors in caring for the estate which had been intrusted to them. They well knew if others interested in the estate became aware that they intended to claim their legal rights that there would be hard feeling and friction in all their subsequent business relations. There was no legal requirement that they should give personal notice to the other beneficiaries of their election. Their concealment of this fact could work no harm to the other beneficiaries, and at most it was a question of ethics rather than of law whether they should at once openly have proclaimed their intention, or remained silent for the sake of harmony. I can find no legal reason, therefore, for denying to these executors and trustees the right to revoke the election they first made to take the salary after the radical change in the situation made by the decision of Mr. Justice FOOTE, and I can find no act since such revocation which would forfeit to them the right to their full legal commissions.

Were this question *res nova*, I should concur in the result reached in the prevailing opinion, on the ground that under the will of the testator these trustees were entitled to no greater compensation than that allowed thereunder. The decision of the Second Department in Matter of Arkenburgh (38 App. Div. 473), though made by an able court, is not convincing. Under that decision a testator may deny to his executors any compensation, and if they act they can receive no compensation, because they have been denied the same in the will. If, however, a testator provides in his will that an executor may have \$100 for his services *and no more*, the executor may elect to take the full commissions allowed by law, notwithstanding the prohibition in the will. This, to my mind, presents a legal paradox so absurd that such construction should not be permitted. If under section 2730 of the Code of Civil Procedure

(as amd. by Laws of 1905, chap. 328), which is now section 2753 of the Code of Civil Procedure (as amd. by Laws of 1914, chap. 443), the right to the election is given to the executor, where there be no words of limitation in the will, the section as thus construed is logical and perhaps reasonable. Where, however, the will prescribes a definite limit to the compensation which they shall receive, that limit should, in my judgment, govern with like force as if the testator has required the executors to act without compensation. Notwithstanding these views, it is perhaps more seemly to follow the decision of the Second Department, until the law shall be otherwise declared by the court of last resort.

I, therefore, vote for a reversal of the decree in the matter complained of by the appellants.

WOODWARD, J., concurred, except as to the views expressed in reference to the case of *Matter of Arkenburgh* (38 App. Div. 473).

Decree affirmed, with costs.

NOTE ON COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

At common law the office of personal representative was regarded as honorary, to be performed without remuneration. (*Manning v. Manning*, 1 Johns. Ch. 527.)

But in the United States and Canada he is allowed a reasonable compensation for services. (*Matter of Prentice*, 25 N. Y. App. Div. 200; *Halsey v. Van Amringo*, 6 Paige 12.)

Executors are not entitled to compensation for services which are not properly connected with the settlement of the estate or for acts done for their own benefit. (*Miller v. Congdon*, 14 Gray Mass. 114.)

Commissions are generally payable on legacies and distributive shares as well as debts. (See *Walton v. Gairdner*, 111 Ga. 343.)

But not on specific legacies and property delivered in kind to distributees. (*Matter of Whipple*, 81 App. Div. 589; *In re Robinson*, 37 Misc. 336.)

Except where such delivery is equivalent to a payment in money. (*Matter of Curtiss*, 9 N. Y. App. Div. 285; *Matter of Johnson*, 57 N. Y. App. Div. 404.)

The compensation is governed by the law operative at the time of the rendition of his services, not by the law in force at the time of his appointment or the settlement of his accounts. (*Key v. Jones*, 52 Ala. 238. See *Dakin v. Demming*, 6 Paige [N. Y.] 95.)

Where an administrator collects assets in a foreign State and voluntarily brings them into this State his compensation is regulated by the laws of this State. (*Satterwhite v. Littlefield*, 13 Sm. & M. [Miss.] 302.)

Commissions should be allowed on any and all property of deceased taken into possession and for which the executor or administrator accounts. (*Betts v. Betts*, 4 Abb. N. C. 317.)

Where a large portion of the assets of an estate consists of various kinds of property which have not been converted into cash, and the testator's intention was that the estate was to be managed in the first instance by the executors, and then turned over to themselves, as trustees, for their management during the life of the trust, the executors are entitled to full commissions upon the value of the property to be turned over to them as such testamentary trustees. (*Matter of Freel*, 5 Mills Surr. 269.)

Where it becomes unnecessary to exercise a power of sale by executors of their testator's real estate, the personal property being ample to pay all bequests and an annuity to testator's widow and the residuary legatees and devisees give written notice of their election to take the realty free from any and all powers of sale given to said executors, they are not entitled to commissions on the unsold realty in the absence of an actual sale. (*Matter of Ducan*, 10 Mills Surr. 463.)

The same person is entitled to commissions both as executor and trustee when, apart from his executorial duty, there is a devise to him of the subject-matter of the trust, either express or implied; but in such a case he is not entitled to commissions as executor upon moneys received for the sale of real estate devised to the trustees and never sold by them as such. (*Matter of Waterman*, 6 Mills Surr. 537.)

In order to hold that a request to executor is in compensation for services there must be language by which such inference can be inferred. (*In re Kernochan*, 104 N. Y. 618.)

The executor may renounce the legacy and take statutory commissions by a written renunciation. (*Matter of Arkenburgh*, 39 N. Y. App. Div. 473.)

A testator may deprive his executor of all compensation if he so expressly provides in his will. (*Matter of Gerard*, 1 Dem. Surr. 244.)

But a will should not be so construed if it can be otherwise construed with equal reason. (*In re Marshall*, 67 How. Pr. 519.)

Where executor accepts office with knowledge that the will fixes his com-

pensation he is ordinarily entitled only to the amount fixed. (*Matter of Arkenburgh*, 38 N. Y. App. Div. 473.)

Executors and administrators have no right to appropriate assets of the estate on account of commissions until all allowance is made by the court. (*Matter of Furness*, 86 N. Y. App. Div. 96, etc.; *Meeker v. Crawford*, 5 Redf. Surr. 450.)

But their right to commission is not lost by failure to retain funds. (*Matter of Prentice*, 25 N. Y. App. Div. 209.)

But they may retain a sufficient fund in their hands to cover lawful commissions. (*Wheelwright v. Wheelwright*, 2 Redf. 501.)

The executor's compensation has a preference over debts and legacies. (*Williamson v. Wilkens*, 14 Ga. 416.)

Interest is chargeable where commissions are appropriated in advance. (*Wheelwright v. Rhodes*, 28 Hun, 57.)

The executor having presented for settlement his final account as such, after the entry of the decree settling the same he will no longer act in the capacity of executor but thereafter as trustee. He is, therefore, entitled now to full commissions as executor, and the amount of his commissions as trustee will be determined upon his settlement in that capacity. (*Matter of Rafferty*, 5 Mills Surr. 534.)

Where upon the annual accounting of executors and trustees the surrogate had passed upon the accounts, and had published a decision settling the same and directing the entry of a decree thereon and thereafter and before the signing of the decree one of the executors and trustees died and it appeared that the deceased executor and trustee had during his lifetime performed all the duties of his administration and trust except the ministerial act of "paying out" to be done pursuant to the decree, his estate will be allowed a full one-half of one per cent. commission for the "paying out" directed by the decree. (*Matter of Ziegler*, 12 Surr. 104.)

Upon an accounting by the executors of a deceased executrix they are not to be credited with commissions upon a mortgage taken by the deceased executrix upon a conveyance by her of real estate pursuant to a judgment for the specific performance of a contract made by the testator in his lifetime; where she neither received or paid out any of the moneys secured by the mortgage in her life time and where the mortgage was not taken by anyone from her in place of cash, nor was anyone in a position to elect that it should be treated as money. (In the *Matter of Dill*, 6 Mills Surr. 539.)

The costs and expenses of an annual accounting by a testamentary trustee should be borne by the income unless they have been incurred in the administration, preservation or increase of the principal. (*Matter of L. I. & T. Co.*, 10 Mills Surr. 64.)

Commissions are payable from the general personal estate of decedent. (*Westerfield v. Westerfield*, 1 Bradf. Surr. 198.)

Where personal estate is exhausted, compensation for services in selling

land for payment of debts and paying out proceeds, is a charge thereon. (*Loftis v. Loftis*, 94 Tenn. 232. See *Matter of Mansfield*, 10 Misc. [N. Y.] 296; *Myers v. Bolton*, 157 N. Y. 393.)

One who takes possession of the estate of a relative in time of war when there is no authority competent to grant letters of administration will be considered as a trustee acting for the best and will be allowed commissions on his accounts. (*Lloyd v. Cannon*, 2 Desaus. [S. C.] 232.)

One who is entitled to administer, but never actually does so, may be entitled to commissions as against one who does administer through improper conduct in obtaining a wrongful appointment and failing to deliver the estate to the former. (*Pieral v. Debuys*, 5 Mart. [La.] 428.)

Though a will is afterwards found invalid, this does not deprive the executor appointed of compensation for services rendered in good faith. (*Comstock v. Hadlyme Ecc. Soc.*, 8 Conn. 254; *Bradford v. Boudenot*, 3 Fed. Cas. No. 1765, 3 Wash. 122.)

Commissions are not chargeable on legacies unless indirectly by way of abatement when the general estate is not sufficient to pay them. (*Westerfield v. Westerfield*, 1 Bradf. Surr. 198.)

And where realty is sold under direction of the will or decree of the court by the personal representative he is entitled to commissions. (*Matter of Prentice*, 25 App. Div. 209.)

Where business of decedent is carried on the proper compensation is a reasonable allowance for time and labor in carrying on the business in addition to legal commissions. (*Lent v. Howard*, 89 N. Y. 169.)

Where a testator directs his executor to keep his estate invested and divides it into equal shares, one of which he gives to his widow to be paid to her within two years after her death, and one of the others to each of his three sons to be paid to them in annual payments after each has reached the age of twenty-one years; and where the provision for the widow is less than she would receive if there were no will and there is nothing in the will importing an intention on the part of the testator that a minor son shall be dependent upon her for support nor any provision made in the will for his support until he attains his majority and the payments to him of his share in the estate begin under the terms of the will, he is entitled to have the income from his share of the estate paid to him in the meantime. (*Matter of Rafferty*, 5 Mills Surr. 534.)

Where a testator gives all the property pertaining to his business, part of which is a foundry, in trust to continue the business but to stop the same when the trustee's management fails to produce a certain profit and all the residue of the estate is given to the trustees to collect the rents and the income thereof with directions to pay the same to certain designated beneficiaries, the substituted trustee, upon accounting, is under no obligation to charge himself with rent of the foundry and pay the amount so

charged into the trust of the residuum of the estate the net result to the beneficiaries under the trust remaining unaffected whichever course was pursued. (*Matter of Froelech*, 5 Mills Surr. 338.)

It appearing that the testator's widow, one of the original trustees, instead of taking personal control and management of the business, employed a manager at a large salary and after a time resigned as trustee, and with the commission of ten per cent. of the profits of the business which had been allowed to her as compensation, formed a new company of which her second husband was president, who started a business in opposition to the business which he had managed for her when she was trustee, the substituted trustee is not chargeable with the loss of business during his administration, there being no direct proof of any loss occasioned by any lack of attention on his part. (*Id.*)

Inasmuch as the rent of the foundry was not a running expense of the business as contemplated by the testator, and as the limitation under which the business was to be conducted has not, therefore, been reached, the business should be continued by the substituted trustee. (*Matter of Froelich*, 5 Mills Surr. 338.)

Where a testatrix provides for continuing her business, an arrangement between her executrix and executor by which the latter should continue to manage the business as he had done in the lifetime of the testatrix and be paid the same compensation therefor, under which arrangement he continued to manage the business with skill and to the advantage of the estate, will be upheld. (*Matter of Kempf*, 6 Mills Surr. 60.)

An executor or trustee may be granted an allowance for counsel fee paid in resisting an effort to remove him from office only on the theory that the expenditure was made in due course of administration and for the benefit of the estate; that he was successful in avoiding removal is not of itself sufficient to justify the allowance. (*Matter of Titcomb*, 10 Mills Surr. 373.)

The estate cannot be charged with the expenses of the executor in the employment of counsel to oppose a motion by the executrix to compel him to deliver to her certain personal property of the estate then in his hands upon which he claimed commissions. (*Matter of Whitney*, 10 Mills Surr. 111.)

On the judicial settlement of the accounts of an administratrix she may be allowed from the estate the amount paid to counsel for services in resisting a proceeding to revoke her letters in which it was found that she was the lawful widow of intestate and to have been at all times rightfully in office as administratrix. (*Matter of Higgins*, 10 Mills Surr. 370.)

An executor cannot be allowed for counsel fees until they have been actually paid. (*Matter of Woods*, 6 Mills Surr. 189.)

Where a trustee made an investment in the bonds of an industrial corporation secured by the usual mortgage to a trustee, and during the trial

of a proceeding to remove him, in which the facts as to such investment were shown and its unlawfulness asserted the trustee sold the bonds without loss and reported that he had received and held the proceeds in place of the bonds, the services of counsel in the proceeding were not rendered for the benefit of the estate and there can be no allowance to the trustee for counsel fees, nor for sums paid to a real estate expert whose services were primarily directed to the defense of the removal proceedings and in no way required for any general need of the estate. (Matter of Titcomb, 10 Mills Surr. 373.)

Payments to attorneys for services which should have been performed by the executor will not be allowed; nor will a bill for attorneys' services in an unsuccessful endeavor to remove his co-executor. (Matter of Archer, 5 Mills Surr. 460.)

An executor of a deceased testamentary trustee is not entitled to commissions upon the trust estate in the hands of his testator at the time of his death, nor even upon sums of money which have since been collected by him for rents and interest on mortgages belonging to the trust estate. (Matter of Ingraham, 6 Mills Surr. 496.)

But where he is subjected to inconsistent demands by two successors of the original trustee, one a substituted trustee appointed by the surrogate, and the other an agent and representative of the Supreme Court to fulfil the same trust, he will not be required to turn over the trust estate without compensation for his services and the proper expenses which he has incurred in the payment of his counsel. (Matter of Ingraham, 6 Mills Surr. 496.)

An executor is chargeable on the judicial settlement of his account with rents of the decedent's real estate which he has collected, including rents collected from real estate specifically devised. (Matter of Woods, 6 Mills Surr. 189.)

Expenditures, since the death of the testator, for the entertainment of buyers in order to secure their good will, having been approved in all previous accounts, and having been continued by the substituted trustee and it not appearing that the amounts therefor were improper or incorrect, he should not be charged therewith though unaccompanied by vouchers as it will be assumed that the testator, who had adopted such practice, in directing his trustees to carry on the business, contemplated the necessity of their doing the same in order that the business might be managed with the same degree of profit attained during his lifetime. (Matter of Froelich, 5 Mills Surr. 338.)

Where the expenditure for permanent improvements made to an estate is made for the best interests of the remaindermen as well as the life tenant and does not contravene the terms of the will, the cost should be paid out of the corpus of the estate or apportioned between the life tenant

and the remaindermen according to the benefit accruing to each. (*Matter of Whitney*, 10 Mills Surr. 111.)

On the removal of a testamentary trustee because incompetent and otherwise unfit for the due execution of the trust and because it had been improvident in the management of the estate where the trust remained to be executed by a new trustee, commissions should not be allowed to the trustee removed. (*In the Matter of Williamsburgh Trust Co.*, 6 Mills Surr. 541.)

Where an administrator has rendered services, the validity of his appointment cannot be questioned on the accounting, and he is entitled to expenses and commissions. (*Carroll v. Hughes*, 3 Redf. Surr. 337.)

An executor will not be allowed extra compensation for his services in serving citations in the proceeding for the probate of the will; and where, being a lawyer, he attends to all the business of conducting such proceeding an allowance will not be made to his brother-in-law, also a lawyer, for such services where the later went to the surrogate's office at the executor's request and "simply stayed until it was over," the executor thinking there might be some opposition; and where in the defense of a small claim the executor incurred unnecessary and unreasonable expense, his allowance therefor will be limited to the amount of taxable costs and disbursements. (*Matter of Wick*, 6 Mills Surr. 72.)

A representative is not entitled to commission for collecting a debt due by himself to the estate. (*In re Hoffer*, 156 Pa. St. 473.)

But is entitled on one due him from the estate. (*Matter of Mount*, 2 Redf. Surr. 405.)

An executor cannot be paid out of the estate for his personal labor and services in repairing and painting the real estate of the decedent. (6 Mills Surr. 189.)

A claim by an executor for services as undertaker in burying the husband of the testatrix eight years before her death is barred by the statute of limitations and a payment of \$400, on account of the claim, which is not shown to have been made within six years before her death does not avail to take the claim out of the statute. (*Matter of Pummer*, 5 Mills Surr. 298.)

An executor should not be allowed \$329.50 for the funeral expenses of his testatrix whose whole estate did not exceed \$500. In such a case \$150 is a reasonable allowance; if the executor desires greater ostentation and display than the estate can reasonably afford, he should pay for it himself. (*Matter of Primmer*, 5 Mills Surr. 298.)

An executor is not entitled to be allowed for interest on the bill of the undertaker, forming part of the funeral expenses of the decedent, when he has received moneys and paid them out for other debts of the estate and legacies. (6 Mills Surr. 189.)

A husband, though insolvent, who is appointed administrator of his wife's

estate, is entitled to compensation. (*Moulton v. Smith*, 16 R. I. 126; *Reed's Estate*, 4 Phila. [Pa.] 375.)

Where income on trust fund is to be disbursed to the use and benefit of a person for life, the representative is entitled to commissions upon such income. (*Foote v. Bruggerhof*, 66 Hun, 406.)

No commissions on sums surcharged for neglect or misconduct. (*Gilson's Estate*, 18 Kkly. Notes [Pa.] 570.)

Where an executor under a will has been awarded excessive commissions and allowances on each of his annual accountings, and has rendered his final account and been discharged, he is not guilty of "constructive fraud," and a suit in equity to recover such excessive allowances brought after ten years have elapsed, is barred by the statute of limitations. (*Matter of Spaceholz v. Sheldon*, 11 Mills Surr. 453.)

In the Matter of the Application for Letters of Temporary Administration on the Goods, Chattels and Credits of MARIE HILL, Deceased.

EQUITABLE TRUST COMPANY OF NEW YORK, as Committee of the Estate of ALPHONSE J. STEPHANI, a Life Convict, Appellant; THOMAS M. HEALY, as Temporary Administrator, etc., of MARIE HILL, Deceased, Respondent.

(*Supreme Court, Appellate Division, First Department, Feb. 19, 1915.*)

EXECUTORS AND ADMINISTRATORS—REMOVAL OF ADMINISTRATOR—REFUSAL TO PROSECUTE ACTION—WHEN NO VIOLATION OF ORDER OF SURROGATE—PRACTICE—JOINDER OF PROCEEDING TO APPOINT ADMINISTRATOR WITH PROCEEDINGS FOR REMOVAL.

A temporary administratrix should not be removed from office on the ground that she has wilfully refused or neglected without good cause to obey a lawful direction of the surrogate contained in an order or decree, or to obey a provision of the law relating to the discharge of a duty, contrary to subdivision 3 of section 2569 of the Code of Civil Procedure, where it appears that she did not disobey any order or decree of the surrogate, but merely refused to prosecute, as administratrix, an appeal in an action in which her intestate had been defeated, where it is shown

that although the intestate had creditors she left a considerable estate in a foreign country of which an executor has been duly appointed.

It is irregular to engraft upon a proceeding to appoint an administrator an entirely separate proceeding to remove her.

APPEAL by Equitable Trust Company of New York, as committee, etc., from an order of the Surrogate's Court of the county of New York, bearing date the 17th day of December, 1914, removing Maria J. M. Lawrence as temporary administratrix, etc., of Marie Hill, deceased, and also from an order bearing date the 15th day of January, 1915, resettling and amending the prior order *nunc pro tunc*.

Carl A. Hansmann of counsel (Rounds, Schurman & Dwight, attorneys), for the appellant.

Isham Henderson of counsel (Moses, Morris & Henderson, attorneys), for the respondent.

CLARKE, J.—In 1913 Mrs. Marie Hill, a childless widow, residing in Dresden, Germany, commenced an action against the Guaranty Trust Company and J. Lynch Pendergast, as trustees under the last will and testament of Josephine Stephani, deceased, Alphonse J. Stephani and the Equitable Trust Company of New York, as committee of the estate of Alphonse J. Stephani, to construe the will of Josephine Stephani and to have declared unlawful a certain accumulation of income thereunder in the hands of said trustees arising under the trust created by said will, of which trust Alphonse J. Stephani was the beneficiary for life with remainder "to my said sister Marie Hill absolutely and forever, or in case she be then dead, to her children, share and share alike," upon the theory that said accumulation was unlawful, and was, under the statute, the property of Marie Hill, as the person presumptively entitled to the next eventual estate.

That action was tried at Special Term, and resulted in a judgment in favor of the plaintiff. An appeal was taken by the Equitable Trust Company, as committee of the estate of Alphonse J. Stephani, a life convict, and as his guardian *ad litem*. This court unanimously reversed the judgment, and directed the complaint to be dismissed. (Hill v. Guaranty Trust Co., 163 App. Div. 374.) Judgment of reversal was entered August 19, 1914.

Mrs. Hill died in Dresden on August 23, 1914. Without knowledge of her death her attorneys filed notice of appeal to the Court of Appeals on September 3, 1914. On October 14, 1914, Mrs. Hill's former attorneys in said action, alleging that they were persons interested in her estate, and were creditors thereof by reason of certain disbursements made by them as her attorneys in said action, filed a petition in the Surrogate's Court for the appointment of a temporary administrator of her goods, chattels and credits, and for the issuance of citation to the next of kin, including the Equitable Trust Company, as committee of the estate of Alphonse J. Stephani. The petition set forth that the only property of any kind left by deceased within the State of New York was the said cause of action pending in the Supreme Court. On November 19, 1914, an order was made granting temporary administration to Mrs. Maria J. M. Lawrence, a niece of Mrs. Hill. Mrs. Lawrence, her sister, Mrs. Sophie E. M. Leith, and the life convict, Alphonse J. Stephani, are the sole next of kin of Mrs. Hill. The order of the surrogate provided that the letters of temporary administration should be limited to the prosecution of said cause of action. Mrs. Lawrence subsequently declined to verify papers presented by the former attorneys of Mrs. Hill necessary to procure her substitution as party plaintiff in said suit in the Supreme Court, and declined, after consultation with her sister, to authorize the taking of an appeal to the Court of Appeals therein because "she considers the claim that was

set up on behalf of Marie Hill in said suit, to the accumulated income of the trust created for the benefit of Alphonse J. Stephani, as most unjust and contrary to the wishes and intentions of the testatrix, Josephine Stephani, and that deponent's sister, Mrs. Sophie E. M. Leith, agrees with her, that they both feel that the institution of said suit was a grave mistake and a wrong against Alphonse J. Stephani, and they are opposed to the further prosecution thereof, and that they, together with said Alphonse J. Stephani, are the sole next of kin of said Marie Hill, deceased." She also says that Mrs. Hill left a last will and testament of which Heinrich Jucho, a notary public of No. 12 Neue Mainzer Strasse, Frankfort a/M., Germany, is the executor, and that further prosecution of said suit is not necessary for the protection of creditors of the estate of Mrs. Hill, as she left an ample estate in Germany, valued at from \$50,000 to \$100,000.

The petitioners thereupon, in the same proceedings in the Surrogate's Court in which Mrs. Lawrence had been appointed temporary administratrix, made a motion for an order to show cause why she should not be removed. Said motion was granted. She was removed, and Thomas M. Healy was appointed as such temporary administrator, his powers being also limited to the prosecution of the appeal from the judgment referred to.

From this order the Equitable Trust Company, as committee of the estate of Alphonse J. Stephani, appeals.

Section 2569 of the Code of Civil Procedure * provides grounds upon which an administrator may be removed. The only ground therein provided which by any possibility would apply is subdivision 3, "Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of

* See Laws of 1914, chap. 443.—[REp.]

the surrogate contained in a decree or order, or any provision of law relating to the discharge of his duty."

Mrs. Lawrence did not disobey any direction of the surrogate contained in the decree or order because none such was made, nor has it been found as a fact that she has wilfully or without good cause refused or neglected to be substituted as plaintiff in the action in the Supreme Court, and to take an appeal to the Court of Appeals if it is to be inferred that she was appointed administratrix for that purpose. On the contrary, she has shown that Mrs. Hill died testate, leaving a considerable estate and a duly appointed executor, and that all of the next of kin are satisfied with the decision of the Appellate Division and do not desire an appeal to the Court of Appeals. I do not understand that it is the duty of an administrator to exhaust all possible remedies and to take all possible appeals, nor do I understand that counsel may be forced upon an administrator, but that he has some discretion in the exercise of his duties.

We think it was irregular to engraft upon a proceeding to appoint an administrator an entirely separate proceeding to remove her, and that the order appealed from should be reversed, with ten dollars costs to the appellant.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and SCOTT, JJ., concurred.

Order reversed, with ten dollars costs and disbursements to appellant. Order to be settled on notice.

**ADDIE D. PLATTENBURG, Respondent, v. ALICE HALL BRIGGS,
as EXECUTRIX, etc., of ANGELINE P. HALL, Deceased,
Appellant.**

(Supreme Court, Appellate Division, Third Department, March 3, 1915.)

**DECEDENT'S ESTATE—ACTION UPON QUANTUM MERUIT FOR SERVICES
RENDERED TESTATRIX—AGREEMENT BETWEEN PLAINTIFF AND TESTATRIX
CONSTRUED.**

In an action to recover upon a *quantum meruit* for services rendered the defendant's testatrix, it appeared that while the plaintiff was in the employ of the defendant's testatrix, the following agreement was signed in the presence of a witness and delivered to her: "I hereby agree from this date to pay to Addie D. Plattenburg for the care of myself and house and services as heretofore, the sum of six dollars per week, & if she shall remain with me during my lifetime to provide for a generous sum to be paid to her at my decease with the distribution of my estate & it is agreed further that she shall be subject to the dictation and direction of only myself." The plaintiff remained with the defendant's testatrix for between seven and eight years, and until her death. She claims that her services were worth twenty-one dollars per week for the full time, upon which she credited six dollars per week paid and three hundred dollars received under the will, and asks a judgment for the balance.

Held, that while the promise to pay a "generous sum" is too indefinite to be speculated upon by a jury, nevertheless there must be implied within that promise a definite agreement to pay the fair value of such services, which may be ascertained, and if they exceed the moneys received by the plaintiff she may recover therefor.

APPEAL by the defendant, Alice Hall Briggs, as executrix, etc., from an order of the Supreme Court, made at the Essex Special Term and entered in the office of the clerk of the county of Saratoga on the 18th day of November, 1914, overruling a demurrer to the complaint.

Henning & Eddy (Edward D. Eddy of counsel), for the appellant.

Edward T. Brackett (Harold H. Corbin of counsel), for the respondent.

SMITH, P. J.—The action is to recover upon a *quantum meruit* for services rendered the defendant's testatrix. Upon September 21, 1907, plaintiff was in the employ of the defendant's testatrix. Upon that day the defendant's testatrix signed and delivered to plaintiff a paper, of which the following is a copy:

"THE NEW COLUMBIAN.

"E. C. QUINLAN, Prop.

Opp. Convention Hall.

"AGREEMENT.

"SARATOGA SPRINGS, N. Y., Sept. 21, 1907.

"I hereby agree from this date to pay to Addie D. Plattenburg for the care of myself and house and services as heretofore, the sum of six dollars per week & if she shall remain with me during my lifetime to provide for a generous sum to be paid to her at my decease with the distribution of my estate & it is agreed further that she shall be subject to the dictation and direction of only myself.

"MRS. A. P. HALL."

(Endorsement.)

"I hereby certify that I was present and saw Mrs. A. P. Hall sign within paper.

"Sept. 27, 1907.

G. F. COMSTOCK."

The plaintiff remained with the defendant's testatrix for between seven and eight years and until her death. She was given a legacy of \$300 by the will. Her complaint alleges that her services were worth \$21 per week for the full time, upon which she credits \$6 a week paid, and \$300 received under the legacy, and she demands judgment for the balance.

The main question arises upon the construction of this paper. The plaintiff contends that it contains a promise to pay her a generous sum for service to be rendered in the care of the promisor and of her household for the rest of her life. The defendant's contention is that there is here an agreement only to pay the sum of six dollars per week for services, and that the promise of a generous sum at death is the promise of a gratuity, which is unenforcible. While the promise to pay a generous sum may be indefinite, nevertheless there must be implied within that promise a definite agreement to pay the fair value of such services, should such value exceed the sum of six dollars per week. We cannot agree with the Special Term that it is for the jury to say what is a generous sum. That term is too indefinite to be speculated upon by a jury. Under the implied promise to pay a just compensation, however, the fair value of the services may be ascertained, and if they exceed the moneys that have been paid, including the legacy received, plaintiff would seem to be entitled to recover therefor. The order should, therefore, be affirmed, with ten dollars costs and disbursements, with usual leave to the defendant to withdraw the demurrer and answer upon payment of costs at Special Term and of this court.

All concurred; KELLOGG and HOWARD, JJ., in result.

Order affirmed, with ten dollars costs and disbursements, with usual leave to defendant to withdraw demurrer and answer upon payment of costs at Special Term and in this court.

SARAH S. PRIMMER and Others, Appellants, v. CLARA E. PRIMMER, Individually and as Executrix, etc., of JOHN D. PRIMMER, Deceased, Respondent.

(*Supreme Court, Appellate Division, Third Department, March 3, 1915.*)

WILL—EXECUTION—INSTRUMENT MUST BE READ TO BLIND TESTATOR—
STATUTORY ACTION TO TEST VALIDITY OF PROBATE—EVIDENCE—BURDEN
OF PROOF.

On a proceeding to probate a will the proponent must satisfy the surrogate that it was executed with all the formalities required by law and, if the testator was blind, he must show that he was made aware of the full contents of the paper he was executing. This rule, however, refers to the probate of a will by the surrogate.

Where an action is brought under section 2653a of the Code of Civil Procedure to test the validity of such probate, the decree of the surrogate admitting the will to probate is declared by the statute to be *prima facie* evidence of due execution and of the validity of the will. Hence, the burden is shifted to the plaintiff in such action to show lack of due execution and validity, and where he claimed that the testator was blind and that the instrument was not read to him, he is under the burden of showing such facts. The proponent-defendant is not under the burden of showing that the will was in fact read over to the testator.

APPEAL by the plaintiffs, Sarah S. Primmer and others, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Otsego on the 15th day of June, 1914, upon the verdict of a jury, and also from an order entered in said clerk's office on the 20th day of June, 1914, denying the plaintiffs' motion for a new trial made upon the minutes.

Pierce H. Russell, for the appellants.

Gibbs, Holmes, Waterman & Holmes (Clarence E. Holmes of counsel), for the respondent.

WOODWARD, J.— John D. Primmer died at the city of Oneonta in March, 1912, leaving a last will and testatment. The will was dated July 19, 1899, and subsequently and on the 17th day of March, 1911, nearly one year before his death, the decedent made and executed a codicil to such last will and testament. Both of these papers were duly probated by the surrogate of Otsego county, and this action was brought under the provisions of section 2653a of the Code of Civil Procedure to test the validity of such probate. The case was tried and submitted to the jury upon the single question of the testamentary capacity of the decedent at the time of executing the codicil to the will, the learned court having held that there was no evidence to support the allegations of undue influence, fraud, etc., alleged in the complaint. The jury found in favor of the defendant, sustaining the codicil, and appeal comes to this court.

There can be no question that there was evidence to support the contention of the defendant. The change made in the will was not an unnatural one; it merely changed, so far as the effect of the will is concerned, the disposition of a single piece of real estate, which was given in fee to testator's daughter, who lived at home with him, in the place of a life use as fixed in the original will. This daughter had remained unmarried and attended to the household duties of the father, and it is entirely natural and proper that he should, after years of such service, conclude that she was entitled to the fee rather than to a mere life use, and especially so as there appears no good reason why the other children should be preferred. There was some evidence that the testator, who was eighty-two years of age at the time of making the codicil, was then in the early stages of senile dementia, but there was likewise evidence fairly tending to show that he fully comprehended what he was doing, and the verdict of the jury ought not to be disturbed in the absence of error in the conduct of the case.

The only question necessary to consider is the charge of the court, it being urged on the part of the plaintiffs that there was error in refusing to charge the plaintiffs' request as to the burden of proof. The court had charged the jury that there was but one issue to be determined and that was the testamentary capacity of the testator on the 17th day of March, 1911. No exception was taken to the charge as made; there was no suggestion that there was any other issue to be submitted, except that counsel for plaintiffs, after the close of the charge, asked the court to charge "that if the jury believe John D. Primmer could not see to read on the 17th of March, at the time of the execution of the alleged codicil, that it was incumbent upon the proponents or defendants in this case to show that the paper was read over or was made known to him before he executed it." The court asked if there was any evidence tending to show that he could not read, and counsel responded that there was evidence that he could not see, and the court responded, "If there is such evidence I will charge that." Counsel then continued and requested the court to charge "that there is no evidence in the case to show that this was done, and that as matter of law if they believe it was not done, then the codicil cannot be sustained." The court said: "There is no evidence in the case to show it was not done," and counsel responded: "Yes, sir; if they believe he could not see and the contents of the will was not made known to him at the time of the execution, then as matter of law the codicil cannot be sustained." The court admitted that this was true as an abstract proposition, but added, "there is no evidence in the case tending to show that it was not done. I think the presumption is that [it] was done by the attorney who drew it." No exception was taken at this point, and counsel continued: "Also to charge that it was incumbent upon the proponents to show that the testator knew what the paper was he was signing and what it contained." The court responded that if "he

was blind it would have to be read to him; that is the rule. You are right about the rule, but there is no evidence in the case showing or tending to show it was not done." No exception was taken here, and counsel continued: "To charge that the burden was upon the other side to do that; they seek to sustain the will." The court responded: "No, the burden is upon you to show it was not done," and to this the plaintiffs took an exception.

The plaintiffs had acquiesced in the charge of the court limiting the submission to the testamentary capacity of the testator, and this exception relates wholly to a detail in the execution of the will, going to the question of fraud in its inception. Whether it is important to consider the question of the burden of proof as to an issue not submitted to the jury, it may not be worth while to determine now. There can be no doubt that the proponent of a will must satisfy the surrogate, as a condition of probate, that the same was executed with all the formalities required by law, and that if the testator was blind, it would be necessary to show that he was made aware of the full contents of the paper which he was executing, but these rules relate to the probate of the will by the surrogate. Section 2653a of the Code of Civil Procedure gives contestants an opportunity for a new trial of the issues, but it is provided that "on the trial of such issue the decree of the surrogate admitting the will or codicil to probate shall be *prima facie* evidence of the due attestation, execution and validity of such will or codicil." "Due attestation, execution and validity" means lawful attestation, execution and validity; the decree of the surrogate, unless overcome by evidence, stands. The burden of proof is, therefore, upon the party asserting that such codicil is not duly attested, executed, etc.; he is bound to produce evidence tending to show lack of "due attestation, execution and validity," and in the absence of such evidence there is no issue presented.

There has been one adjudication upon the question of due execution; ordinarily that would be conclusive in the absence of an appeal, but section 2653a has provided a further opportunity for trying the issues before a jury, but it has made it a condition of such an action that the plaintiff must take upon himself the burden of showing that the original adjudication was wrong, and if there was any question as to the due execution of this will, it was for the plaintiffs to show the facts; the defendant, standing upon the original adjudication, was not bound to go over this ground again unless the facts on which the adjudication was made were challenged. The difficulty with the plaintiffs' position is that there is an effort to apply rules governing the original probate proceeding to a special statutory privilege, where the Legislature has established different rules; and the proposition is elementary that where the Legislature has granted a privilege, subject to conditions, the privilege cannot be accepted and the conditions be rejected. (Matter of Board of Water Supply, 211 N. Y. 174, 183.)

The rule of law governing this case was correctly stated by the court, and the judgment and order appealed from should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

In the Matter of the Will of ANTONETTA IOVINELLA.
SALVATORE IOVINELLA, Appellant; MARY RASSO and Another,
as Executors, etc., Respondents.

(*Supreme Court, Appellate Division, Third Department, March 3, 1915.*)

SURROGATE'S COURT—PRACTICE—JURY TRIAL OF ISSUES ARISING ON PROBATE OF WILL—CODE AMENDMENT MADE IN 1914 NOT APPLICABLE TO PENDING LITIGATION—STATUTES CONSTRUED.

As section 2771 of the Code of Civil Procedure expressly provides that the amendments to chapter 18 of the Code relating to Surrogates' Courts shall not affect any action or special proceedings pending when the amendment takes effect, the surrogate has no power to order that issues raised in a proceeding to probate a will shall be tried by a jury in the Supreme Court, where the proceeding was commenced before September 1, 1914, the date that the amendment allowing such trial went into effect.

Section 2771 of the Code of Civil Procedure, making the amendments aforesaid inapplicable to a litigation pending before the amendment, affects not only litigation pending in those counties having special laws, but all litigation in the Surrogates' Courts throughout the State.

It seems, that although section 2538 of the Code of Civil Procedure, as amended, is inapplicable to such pending litigation, former section 2653a of the Code, providing for an action in the Supreme Court to determine the validity of a will, although repealed, remains in force as to pending proceedings.

APPEAL by Salvatore Iovinella, contestant, from an order of the Supreme Court, made at the Schenectady Trial Term and entered in the office of the clerk of the county of Schenectady on the 4th day of January, 1915, striking the above-entitled proceeding from the calendar of the Supreme Court and sending it back to the Surrogate's Court of Schenectady county for trial and determination.

Nathaniel B. Spalding, for the appellant.

Henry S. Baehler, for the respondents.

HOWARD, J.— In July, 1914, the surrogate of Schenectady county issued a citation to the contestant and others requiring them to attend the probate in question. The citation was made returnable September 1, 1914. On the return day objections to the probate of the will were made and a jury trial demanded. Thereupon, under section 2538 of the Code, the surrogate ordered certain questions to be tried by a jury in the Supreme Court. The proceeding was placed on the Supreme Court calendar; but, on motion, an order was made in that court striking the proceeding from the calendar on the ground that the surrogate was not authorized to certify the trial to the Supreme Court under section 2538, the proceeding having been begun before September 1, 1914. The matter was sent back to the Surrogate's Court.

A complete revision of the surrogate's practice was effected by chapter 443 of the Laws of 1914. Section 2538 of the Code under this revision reads: "In any proceeding in which any controverted question of fact arises, of which any party has constitutional right of trial by jury, and in any proceeding for the probate of a will in which any controverted question of fact arises, the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding seasonably demands the same. The surrogate in such order must direct that such trial be had either before himself and a jury, or at a Trial Term of the Supreme Court to be held within the county, or in the County Court of the county. Either of the surrogates of the county of New York may, in his discretion, make an order transferring to the Supreme Court any special proceeding for the probate of a will pending in said county. If the trial shall not take place in the Surrogate's Court the order must state distinctly and plainly each question of fact to be tried, and shall be the only authority necessary for the trial of such question. The verdict, if not set aside by the judge before whom the

question is tried, shall be certified to the Surrogate's Court by the clerk of the court in which the trial took place, and shall be conclusive except upon appeal." If it were not for a subsequent provision the contestant would, beyond doubt, be entitled to a jury trial under this section; but the last section of the revision, section 2771, raises a doubt and presents the question under consideration. That section reads:

"§ 2771. Effect of this chapter on laws applicable to certain counties. Nothing in this chapter shall repeal, amend or modify any existing law specially applying to any county, which is inconsistent with any section of this *chapter*, nor in any manner affect any litigation, action or special proceeding pending at the time when this act takes effect, and such pending action or special proceeding shall proceed under the practice established, the same as though not affected by this act."

In its original form as that section was presented by the Surrogates' Revision Commission to the Legislature it contained only the first part of the section down to and including the word *chapter*. But the Legislature did not enact it in that form, it added the latter part and then enacted it. As the section now reads, if it is applicable to Schenectady county, the contestant was not entitled to a jury trial because the proceeding was pending when the act took effect. But is the law applicable to all the counties of the State, or only to those counties having special laws inconsistent with chapter 443 of the Laws of 1914? That is the question before us.

The purpose of section 2771, as it was reported by the commission, was clear and certain. It was intended to apply to those counties having special laws on surrogate's practice, and to exempt those counties from the operation of the new law so far as it conflicted with the special laws. The Legislature, wishing to exempt all pending litigation from the operation of the new law, undertook to do so by adding the last part of section 2771. That provision was inserted in an awkward,

unscientific way, at an inappropriate place and under a misleading title. It was the purpose of the Legislature, however, very evidently, to exempt pending litigation not only in those counties having special laws, but all over the State, from the effect of the revised law.

Whether the Legislature acted wisely in making this addition to the report of the commission we are not to say; we are only to discover, if possible, the legislative intent. And whether the section under consideration will result in simplifying the practice or will add confusion we need not determine. Perhaps the legislative thought was, that if litigation already begun and partly accomplished under the old practice, were to be interrupted and continued under the new, disorder and confusion might thus be injected. But however that may be, we are of the opinion that section 2771 was intended by the Legislature to be state wide and that section 2538 does not entitle the contestant to a jury trial before the surrogate, or upon certificate, in a proceeding begun before September 1, 1914. The surrogate of Bronx county has already construed this law as we are construing it. (Matter of Spooner, 87 Misc. Rep. 170.)

But inasmuch as chapter 443 of the Laws of 1914 repealed section 2653a of the Code, it is suggested that this interpretation of the statute deprives the contestant of a jury trial also in the Supreme Court; and, therefore, deprives him absolutely of a jury trial. This is not so, we think. Section 93 of the General Construction Law provides: "Effect of repealing statute upon existing rights. The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected." This provision keeps section 2653a of the Code alive for the purpose of per-

mitting the contestant to prosecute his action in the Supreme Court, that right having "accrued" to him before section 2653a was repealed.

The order appealed from should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

ELDRED A. CARLEY, as Executor, etc., of AUGUSTA M. HARPER, Deceased, Respondent, v. ELIZABETH F. HARPER and Others, Respondents, Impleaded with FLORENCE SKILLIN CLOYD and SIMEON D. SKILLIN, Appellants.

(Supreme Court, Appellate Division, Second Department, March 5, 1915.)

WILL CONSTRUED—REQUESTS TO NIECE AND HER DESCENDANTS—WHEN LEGACY LAPSES—WHEN LEGATEES TAKE AS TENANTS IN COMMON, NOT AS A CLASS—WHEN WILL CONVEYS AFTER-ACQUIRED PROPERTY—REAL ESTATE PURCHASED BY TESTATRIX AFTER MAKING WILL—WHEN GENERAL LEGACIES CHARGED ON LANDS NOT SPECIFICALLY DEVISED—EVIDENCE—INTENTION OF TESTATRIX—ACCOUNTS KEPT BY TESTATRIX—COSTS—ALLOWANCES IN SUIT TO CONSTRUE WILL.

Where a testatrix leaves general legacies to a niece by marriage and to the children of the niece designated by name, with directions that they be "divided among the four children," with a provision for substitution of descendants, there is a bequest to the persons named as tenants in common and not to them as a class. Hence, where the niece and one of her daughters died before the testatrix, the legacy to the latter lapsed while the legacy to the niece went to the surviving children under the substitutionary clause.

In the absence of an intention to the contrary a will speaks from the time of the death of the testator, and disposes of property acquired by him after the execution of the instrument itself. Hence, where a testatrix who resided on the family homestead, a portion of which belonged

to her sister, drew a will in which she devised all her "right, title and interest in the premises" to her sister, if living, or to her descendants, stating that she wished the homestead to be retained by some member of her family as long as possible, the devise was effective to transfer to the deceased sister's descendants not only the interest in the lands which the testatrix owned when she executed the will, but also the interest which she acquired afterwards by purchasing the sister's interest after her death.

On the issue aforesaid the fact that the executors were given a power of sale may be considered.

Will construed, evidence examined, and *held*, that general legacies contained therein were charged upon lands not specifically devised, and constituting part of the residuary estate.

Books of account kept by a testatrix and found in her last residence are admissible, not only to show her system of bookkeeping, but to show her understanding as to the relative values of her real and personal estate, in order to determine whether she had an intention to charge legacies upon lands not specifically devised.

In a suit to obtain a decree construing a will the court has discretionary power to make allowances to the defendants, provided they do not exceed the limitations prescribed by statute.

BURE, J., dissented, in part, with opinion.

APPEAL by the defendants, Florence Skillin Cloyd and another, from part of a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of Nassau on the 7th day of July, 1914, upon the decision of the court after a trial at the Nassau Special Term.

Algernon S. Norton and Percival H. Gregory, for the appellants.

James W. Treadwell (Fred Ingraham with him on the brief), for the respondents Elizabeth F. Harper and others.

Augustus H. Skillin, in person and for the respondents Dallas H. Skillin and others.

Daniel Whitford, for the respondents James Harper and Lillie H. Harper.

George C. Lay, for the respondents Ella Virginia Miller and Augusta Harper Miller.

Edward L. Frost, for the respondent Nassau County Trust Company, as trustee.

THOMAS, J.—Testatrix, a widow since 1896, made her will in 1900 and died in 1911, leaving personal property, exclusive of that specifically bequeathed, amounting to \$81,553.63. The admitted debts are \$2,660.59, and claims rejected amount to some \$2,407.69. The expenses of administration are \$10,557.74, including \$9,000 transfer tax. The net balance is sufficient to pay slightly more than one-half of the general legacies, which are \$132,200. There was real estate, an important part of which was devised specifically to her sister Julia, or her daughters, while the residue of real and personal property was given, one-half to her sister Julia and one-half to Sarah E. Skillin, a niece by marriage, and her children, to whom also was given the other one-half if Julia did not survive the testatrix. The largest legacy is to Sarah E. Skillin and her three named children, and the same persons took contingently under the 9th and 10th paragraphs of the will. There are three questions: (1) Are the gifts to Sarah E. Skillin and her three children in the 8th, 9th and 10th clauses of the will, to the persons named as a class, or as tenants in common, which inquiry arises because Sarah and her daughter, S. Amelia Skillin, died before the testatrix; (2) did the 5th paragraph carry to the devisees not only lot F, on Washington street, which the testatrix then owned in its entirety, but also all the land used by testatrix as her residence, including lot D at the corner of Washington and Prospect streets, of which at the

time of the will she owned one-half and her sister Julia the other undivided one-half, which the testatrix purchased of Julia's executors in 1903; (3) were the general legacies charged on the land not specifically devised, that is, on the residuary? The gifts of general legacies to Sarah E. Skillin and her children, designated by name, with direction that they "be divided among the four equally," with provision for substitution of descendants, were clearly to the several persons as tenants in common and not to them as a class, and the legacy to S. Amelia Skillin lapsed, while that to Sarah E. Skillin went to the surviving children under the substitutionary clause. Under the 5th paragraph, Julia A. Harper's daughters took the interest in 1903 acquired from Julia's executors. The excellent discussion in the briefs cannot be reproduced. But the plain condition was that the testatrix lived on parcels of land (identified as A, B, D and E), whereby she continued a possession that had been in her family since 1816, when they were conveyed to her father, from whom they were transmitted to his wife, by her to his children, and later combined in all conveyances, save as the testatrix finally alienated E to the village of Hempstead. When the testatrix made her will she was confronted with the situation that she could not venture to devise the property with an implication that she owned it, because in that case her sister would be obliged to decline the gift or accept it as devising the whole of the parcels to herself, or, if she died, to her daughter. That is, she would be bound by the will if she took under it. Therefore, the testatrix did all that she could properly do, viz., gave all "right, title and interest in the premises." The will indicates that it was drawn by a lawyer, whose duty it was to know that, in absence of contrary intention, a will speaks from the time of the death of the maker, and that paragraph 5 would carry all property, whenever acquired, that it showed intention to give. Whenever property is acquired, the language of the gift must be

comprehensive enough to cover it. The question is not primarily whether the testatrix owned the property when she made the will, but whether the language of the will would transfer it to Julia or her daughters if she did then own it, or later acquired it. All disability to the devise of after-acquired property was removed. Nevertheless, the testatrix may or may not have wished to will it to Julia or her daughters. The statute (Decedent Estate Law, § 14) removes disability and aids construction. So that a person's will "in express terms, of all his real estate, or in any others terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he is entitled to devise, at the time of his death." If the will had been made the day the testatrix died, the words used in the present case would have carried all of her interest in the property. If she had owned the two halves of the property when she made her will, the words used would have covered her whole interest. The words of gift are unlimited, and, moreover, are deemed to have been spoken when the will took effect. The appellants would construe the words as if they were merely descriptive. Their argument in effect is: She owned but one-half; she gave all to which she had title; therefore, she devised one-half. To make that argument persuasive, the appellants must go farther and show that the testatrix intended to speak as of the date of her will. She uses the words "now reside" to describe her residence, but her residence encompasses all the land used in connection with it. She speaks of the whole of the "premises now owned by me situated on Washington street," whereby, differing from the court below, I conclude that she referred to parcel F only. Those are descriptive words. But she gave all her title in her residence. By residence she means the land in its entirety appropriated for her residence, including parcel D. But she does not assert what the quality of her estate in it was, but as to the property on Washington street she was

able to assert that she owned the whole of parcel F. But that does not show an intention to make her will speak as of the date of its execution. The learned counsel for the appellants instances cases where the testator owned a fractional part and gave it and then acquired the outstanding interest and there was holding that the after-acquired interest did not pass. The interest given was construed to be limited. In other words, as I have tried to show, the words must be broad enough to carry the whole property, while in the cases cited the words limited the gift to a part of the property. It is written at the end of the 5th paragraph: "It is my wish that the homestead in which I now reside at Hempstead, New York, may be retained by some member of my family as long as possible." If appellants are right in their construction, one-half the residence would fall in the residuary. So, if Julia had lived, and there had been no purchase of her part, she would have had it all—but her interest was purchased. It is urged that after purchase it went into the residue, so that if Julia had lived she would have taken three-fourths and the Skillins one-fourth, and that, as she died, the Skillins would take one-half and own in common with Julia's daughters. So two families would be combined in the possession of the residence. It is difficult to believe that the testatrix so intended, although I do not wish to suggest that discovery of the testator's intention is to be aided by subsequent events. Instances may arise where the property in fact owned at the date of a will may be useful in identifying what was intended to be passed, and appellants instance such cases, but the mere fact that a person does not own the whole of the property does not preclude it from passing, if later acquired, and the giving words are wide enough to take it in. The legacies are charged on the land not specifically devised. The respondents are aided by the presence of a power of sale (*Kalbfleisch v. Kalbfleisch*, 67 N. Y. 354; *Le Fevre v. Toole*, 84 id. 95; *Hoyt*

v. Hoyt, 85 id. 142), and the suggested blending of the real estate and personalty in the residuary clause may, under decisions, be considered. (Scott v. Stebbins, 91 N. Y. 605, 613.) The power of sale in the present instance is quite unnecessary, except to sell land not specifically devised for the payment of legacies. The testatrix knew full well that her land would not need to be sold for the purposes of her debts, and I conceive of no use for the power, except to provide funds for legacies from the sale of the land. And yet, such an authority is so commonly a conventional part of a will that its influence may be inconsiderable. The same is true of the mention of real estate and personalty in the residuary clause. In my judgment, the value of that clause in the present case is slight. Its probative value is discussed in Briggs v. Carroll (117 N. Y. 288, 292). If a testatrix gave residuary land and personalty to her legatees it indicates that she thought when she made the will that, after her debts and legacies were paid there would be personalty as well as land left. If it can be conceived that she thought of her land as converted into personalty why would she mention land at all in the residuary clause? The real fact is that the residuary clause is the conventional receptacle for all remnants of property of which effective disposition is otherwise not made. Nor does it seem significant of a purpose to charge the land with legacies that the executors were directed to pay from the residue the transfer tax on all legacies. It might rather argue that the testatrix selected precisely what should be charged on the residue, and by such limitation excluded the charge of the legacies upon it. In short, if she knew that the tax would be some \$9,000 and she charged that on the residue there may be an implication that she did not intend to charge any other or farther sum on it. But the most important consideration is **whether the marked discrepancy between the general legacies, \$132,200, and the available personal property to pay them**

when the will was made, leads to the conclusion that she intended the executors to sell so much of the land not specifically devised as should be required to meet the deficiency. (*Briggs v. Carroll*, 117 N. Y. 288, 292; *McManus v. McManus*, 179 id. 338, 344.) The question is fully discussed in the opinion of CLARKE, J., in *Ely v. Ely* (163 App. Div. 320). Some of the land has been sold, and the question is whether the proceeds shall be paid to the general legatees or to the residuary legatees. The available evidence shows that the personalty at the date of the will applicable to the payment of general legacies was \$97,589.77, while her real estate not specifically devised amounted to over \$40,000. It is urged that the finding omits the Britt mortgages. If so, it should be increased by \$2,377.83. She reduced the amount by the sum of \$29,500 used in purchasing in 1903 her sister Julia's interest in the residence and property in the city of New York, mentioned in the 5th paragraph of the will. If that sum be added to the \$81,553.63, the net sum of the personalty at her death first applicable to the payment of debts, legacies and expenses of administration, the total would be \$111,053.63. The debts, expenses of administration and tax, as they actually existed at or after her death, would reduce it somewhat below \$100,000. If the discrepancy found in 1900 between her applicable personalty and the general legacies actually existed, the finding that the legacies were charged is sustained. While the burden is upon the legatees to prove the intention to charge, it is noticeable that nothing is revealed to show a personal estate that the testatrix could have regarded as sufficient to pay the legacies. The documentary evidence proves that the items of personal property existing when the will was made have been found. It seems improbable that so large an amount as was wanting could have escaped mention or discovery. Documents found in her late residence are:

An account of cash receipts kept by testatrix in 1900.

A statement made by Mr. Carley, her attorney and agent, of a large number of items of personal property.

Another statement made by Mr. Carley, showing money received from her husband, which is \$55,000 less than is in Exhibit B.

Memorandum by testatrix of bank balance on June 12, 1900.

Memorandum by testatrix of deposit in bank June 30, 1900.

Memorandum by testatrix of deposit in bank July 19, 1900.

Memoranda by testatrix of money in house.

Memorandum by testatrix of receipts of money in 1899.

Memorandum by testatrix of moneys received in 1900, and comparison of income for 1900 with 1899, showing a difference, \$375.07.

Statement by Carley of moneys received and noticed in last named memorandum.

Exhibit A seems to be a careful monthly statement in the handwriting of Mrs. Harper, showing moneys received for the year 1900. Except the note of her sister Julia, everything in the diary is, as I understand, mentioned in Carley's statement, Exhibit B, and everything in the statement is mentioned in the cash account, except the Britt mortgages on Conselyea street, \$1,731.14 and \$146.69. The court seems to have admitted memoranda of testatrix, Exhibits D to K, both inclusive, only to show a system of bookkeeping. When there is found in a decedent's last residence her writing that in terms shows her receipts, it is admissible for all purposes, and as it is in evidence it may be so used, although not essential to prove the issue. It shows that her total income for the two years was nearly the same, and that she refers to Carley's statement, which is Exhibit L. So we have the memorandum for 1900, corresponding so closely to Carley's statement of her personal property, the cash account of 1899, the summary of receipts for 1900, and comparison with 1899, and Carley's statement for 1900. Nothing else has been found to indicate other

or further ownership of personal property, except the slip showing money in the house and in the bank, which last, under date of June 12, 1900, is evidence of her balance in the bank, \$2,687.32, and a balance on April 4, 1900, of \$4,349.66. The will was executed on July 21, 1900. The court did not think that her memoranda that she had money in the bank proved that she had. It did not as against the bank, but it did show what her record was, and by Exhibits E and F it appears that \$1,382.21 was later deposited before the will was made. The books of the First National Bank of Hempstead show her undrawn balance \$3,392.96 on June 12, 1900, and on July 21 (date of will) \$3,145.26. The books of the Brooklyn Trust Company show an uniform balance between January and July 21, 1900, of \$1,944.51. It is inferable that in Exhibit D she was referring to her deposits in the Hempstead bank, where alone at the time her drawing account was active. The court has found that she had at the date of the will the combined balances, as they appear on the books of both banks, \$5,089.77. The court has also found that she had gold and currency in her house of about \$1,800. This is based on memoranda in her hand, which show \$1,898.85. After her death there was found cash in house \$2,390.30, and deposits only in the Brooklyn Trust Company and the First National Bank, Hempstead. The documents in the decedent's possession, above considered, definitely show particularized securities and money and deposits, and I do not find a fact suggesting that she had more. Of course, she may have had more. She may, as suggested, have had investments that paid nothing for the years 1899, 1900. But if so, the record of Carley does not show them. It might not do so. Later history does not expose them. They might, indeed, escape detection. But courts decide on probabilities, and it is not probable that so large a sum as would be necessary to make good the payment of the legacies, debts and expenses of administration out of the personalty would so completely escape

reference by the deceased or the research of her executors. The record shows that the testatrix knew her own affairs and carefully scrutinized her financial resources and standing. I think that, quite aside from the exhibits, that are said to have been received qualifiedly, it is proven with a reasonable degree of certainty that the testatrix intended to charge the general legacies on the land not specifically devised. The appellants urge that the court had no power to make allowances to the defendants. I think that, in view of the decision in *Allen v. Stevens* (161 N. Y. 122), the objection is not tenable. Section 3252 of the Code of Civil Procedure authorizes an allowance to the plaintiff in an action "to procure an adjudication upon a will or other instrument in writing." Similar words do not appear in section 3253, although, after specifying an action brought to foreclose a mortgage upon real property or for the partition thereof, it is said, "or in a difficult and extraordinary case, (where a defense has been interposed in an action)." Because of the varying phraseology, it has been decided that an allowance could not be made under section 3253, in *Hafner v. Hafner* (34 Misc. Rep. 99), *Walter v. Walter* (60 Misc. Rep. 570; *affd.*, 133 App. Div. 893). Reliance was placed upon *Savage v. Sherman* (87 N. Y. 277, 284, 285), which was an action for the construction of a will. In that case an allowance was made, not only to the counsel for the trustee, but to each of the counsel representing other parties, and the court said: "We can find no ground upon which the allowances to parties other than the trustee can be sustained. We are not referred to any statute, or to any authority sanctioning such allowances." That decision was in January, 1882. In *Matter of Holden* (126 N. Y. 589) *Savage v. Sherman* (*supra*) is cited as authority that the power to grant allowances must be founded on the Code of Civil Procedure and that a court of equity has no inherent power to make them. *Downing v. Marshall* (37 N. Y. 380) was also cited. In *Brown v.*

Brown (41 N. Y. 507) the question was whether the costs should be paid in reduction of the income of the widow, or out of the reversionary interest. *Allen v. Stevens (supra)* was brought for construction of the will. At the trial there seems to have been no objection to allowances of costs payable out of the estate. The question of power was discussed in the Appellate Division (33 App. Div. 485) but was decided more definitely in the Court of Appeals, where it was said: "The Supreme Court had the power in this suit, brought as it was on the equity side of the court, to award costs to each of the parties, and the question of amount also was in the discretion of that court, and not subject to review here so long as the allowances did not exceed the limitations provided by statute, and this they did not do." The question was raised explicitly in several of the briefs. The counsel for the trustees opposed and discussed the allowances to certain defendants, with references to the Code of Civil Procedure (§§ 3252-3254), and to decisions, amongst others, *Downing v. Marshall (supra)*, *Matter of Holden (supra)*. The brief for the Attorney-General treats of the matter more especially as to the allowance to him. The counsel for the plaintiff defended the allowance to plaintiff, upon the ground, among others, that the case was difficult and extraordinary within section 3253 of the Code of Civil Procedure, and still another party to the appeal discussed the question. The matter was manifestly before the court. I do not attempt to reconcile the decision with former holdings, but follow the later view. The appellants limit their objection to the findings to the power of the court to make them. The other errors suggested by the appellants do not require discussion. If Mr. Carley's testimony in any part may be deemed inadmissible, it may be disregarded without affecting the findings. The 7th conclusion of law may be misunderstood. The \$5,100 therein mentioned should be distributed to all the general legatees and the finding amended accordingly. The 56th find-

ing of fact is not approved, but the result is immaterial, as Parcel F passed under the devise of the residence of the testatrix.

The judgment should be modified to conform to the amended findings, and as so modified affirmed, with costs to each group of respondents.

JENKS, P. J., CARR and RICH, JJ., concurred; BURR, J., read for reversal as to a part of said judgment.

BURR, J. (dissenting in part).— I dissent from so much of the prevailing opinion as holds that the general legacies are a charge upon the residuary real estate. The evidence as to the circumstances of the testatrix when the will was made, the lack of clear evidence that she at that time knew the exact amount of her personal estate, the long period that elapsed between the execution of the will and her death, and the rather small discrepancy between the legacies and the amount of the personalty as it was found to exist at the former date, is insufficient to sustain a finding of intention so to charge such legacies. Neither do I think that, considering the lapse of time between the date of the will and the date of testator's death, the fact that the will contained a power of sale which might have been included therein as a matter of precaution in case of subsequently accruing indebtedness, is sufficient to sustain such finding. I further dissent upon the ground that where there are general legacies in a will, a specific devise and a general residuary clause disposing of both the real and personal estate, a purchaser from a devisee is not required, at his peril, to determine as to the existence of sufficient personal property to pay the legacies under the circumstances here disclosed. This decision may tend to disturb many generally accepted titles.

Judgment modified in accordance with opinion, and as so modified affirmed, with costs to each group of respondents. Order to be settled before Mr. Justice THOMAS.

In the Matter of the Application of PHÆBE A. D. BOYLE, One of the Executors of and Trustees under the Last Will and Testament of JOHN BOYLE, Deceased, for an Order Appointing a Successor to JOHN NEUSCHELER, Deceased, as Executor and Trustee of the Estate of JOHN BOYLE, Deceased.

In the Matter of the Application of PHÆBE A. D. BOYLE, One of the Executors of and Trustees under the Last Will and Testament of JOHN BOYLE, Deceased, for the Removal of Her Coexecutor and Cotrustee, JOHN H. B. BOYLE, as One of the Executors and Trustees of the Estate of JOHN BOYLE, Deceased.

JOHN H. B. BOYLE, Individually and as Executor and Trustee, etc., Appellant; PHÆBE A. D. BOYLE, as Executrix and Trustee, etc., and Others, Respondents.

(*Supreme Court, Appellate Division, Second Department, Feb. 19, 1915.*)

EXECUTORS AND ADMINISTRATORS—REMOVAL OF EXECUTOR AND TESTAMENTARY TRUSTEE—JURISDICTION OF SURROGATE—POWER TO COMBINE PROCEEDING TO REMOVE EXECUTOR WITH ONE TO FILL VACANCY—POWER OF EXECUTOR TO APPOINT SUCCESSOR.

Appeal from a decree of the Surrogate's Court removing an executor and testamentary trustee from office and appointing a successor. Evidence examined and *held*, that, in view of the conduct of the executor and trustee, he was properly removed.

The surrogate has power to entertain concurrently a proceeding to remove a surviving testamentary trustee and one to fill the resulting vacancy, especially where the petition is made by a cotrustee.

Where trustees are given power to appoint a successor, but fail to do so from inability to agree, the power of appointment should not be allowed to fail where the necessities of the estate require an appointment.

APPEAL, in the first proceeding, by John H. B. Boyle, individually and as executor and trustee, etc., of John Boyle, deceased, from a decree of the Surrogate's Court of the county of

Kings, entered in the office of said Surrogate's Court on the 5th day of August, 1912, granting the application of Phœbe A. D. Boyle herein.

Appeal, in the second proceeding, by John H. B. Boyle, individually and as executor and trustee, etc., of John Boyle, deceased, from a decree of the Surrogate's Court of the county of Kings, entered in the office of said Surrogate's Court on the 20th day of December, 1912, removing him as an executor and trustee.

Delos McCurdy, for the appellant.

Charles Strauss (Louis B. Hasbrouck with him on the brief), for the respondent Phœbe A. D. Boyle.

Martin B. Faris, for the respondents Florence M. Bell and others.

Charles Strauss (Eugene D. Boyer with him on the brief), for the respondents Hannah B. Elger and others.

Benjamin H. Newell, special guardian of John Boyle Bell, infant respondent.

Joseph G. Quinn, Jr., for the respondent Henrietta Boyle Rothwell.

John Caldwell Myers, special guardian for Dorothy Hortense Elger and Matilda Isabelle Elger, infants respondents.

PER CURIAM.—The surrogate upon the facts proven was authorized to appoint Mr. Randall as executor and trustee to succeed Mr. Neuscheler, and to remove Mr. John H. B. Boyle from such positions. (Matter of Smith, 26 N. Y. St. Repr. 237; Matter of Havemeyer, 3 App. Div. 519; *Oliver v. Frisbie*, 3 Dem. 22; Matter of Engel, 155 App. Div. 467.) Randall, like his predecessors, had the confidence of the testator, as the will shows, and it was provided that the persons appointed

trustees should be incorporators. It is desirable that such persons should have active participation in the corporation, which is an agency for administering the estate. The value of the trust estate is dependent in a large degree upon the stock of the corporation, the success of which requires provident, attentive and skilful management by its directors. The corporation exists by direction of the will. The intention of Mr. Boyle to prevent or to embarrass the formation of the corporation is evident; his failure adequately to participate in its management as a director appears from his testimony; his suggestion of winding it up or selling his stock appears over his signature, and his reason is founded upon a statement which in dutiful attention to affairs he would have known to be untrue. Repeated evidences of animosity to the will, his misleading statements of the financial condition of the corporation, its credit and the purposes of the directors indicate want of knowledge and inattention of affairs calculated to be injurious to the estate. The detention of the check for \$45,000 without effort to discover the propriety of issuing and paying it until menaced by these proceedings shows an abiding inertia, indifference or design to thwart or retard the administration of the trust. Whatever the motive or cause of his speech and action, or failure to act, he seems to have disqualified himself for holding the position of trust, although his usual integrity and industry in other respects indicate that he could do well if he set himself to the task. The real trouble is that he has not devoted himself painstakingly to the work according to his intelligence and opportunity. It is urged that the money of the estate to a large amount has been invested improvidently in mortgages. If that be so, the fault of it in some degree may be due to his supineness and lack of faithful participation in the administration, and to abnegation of authority. It is not enough for him to complain and accuse when he has not offered prevention by active interposition. He states that from first to last he has been advised by counsel, and

that he has acted upon that advice. It is difficult to believe that counsel would lead him to be unfaithful to the testamentary wishes of his father, the testator, or would be so inexpert in law as to advise him to shun his duties, or to be infirm in matters of administration. The surrogate had power to entertain concurrently the two proceedings, one to remove one of the two surviving trustees, and one to fill a vacancy in the trusteeship, especially upon the petition of the trustee authorized to make the appointment in case of removal of her cotrustee. The trustees were given power to appoint. If they failed from inability to agree, the power should not on that account fail if the necessities of the estate required the appointment, as it did. (Rogers v. Rogers, 4 Redf. 521; Hill Trustees, 188; Bronson v. Bronson, 48 How. Pr. 481, 489; 1 Perry Trusts [6th ed.], § 287, p. 494; Cone v. Cone, 61 S. C. 512; Griswold v. Sackett, 21 R. I. 206.) The brief submitted for the appellant indicates an abatement of professional civility and makes unjust references to an irreproachable public officer. The prominent counsel who subscribes the brief was not in court when argument was made for the respondent, inasmuch as the case was submitted for his clients. He, therefore, could not then be apprised of the objectionable features of the brief. We believe that he has such a high and proper sense of the proprieties of our profession that he will upon reconsideration voluntarily withdraw these unjust aspersions. And we prefer in the first instance to leave this matter for his disposition.

The decree in each case should be affirmed, with costs against the appellant.

JENKS, P. J., THOMAS, RICH and PUTNAM, JJ., concurred;
BURR, J., not voting.

Decree of the Surrogate's Court of Kings county affirmed,
with costs against the appellant.

JAMES MURRAY, Suing on Behalf of Himself and Other Stockholders of BESSON & Co., Similarly Situated, Appellant, v. EDWARD S. SMITH, and Others, as Executors, etc., of MILLARD F. SMITH, Deceased, and BESSON & COMPANY, a Domestic Corporation Respondents.

(*Supreme Court, Appellate Division, Second Department, March 12, 1915.*)

CORPORATION—REPRESENTATIVE ACTION BY STOCKHOLDER—LIABILITY OF ESTATE OF DECEASED OFFICER—LOANS MADE BY BUSINESS CORPORATION OUT OF SURPLUS PROFITS—RATIFICATION OF ULTRA VIRES ACTS BY ACQUIESCENCE—SALE OF GOODS TO OFFICER OF CORPORATION—OBLIGATIONS OF OFFICER AS FIDUCIARY—RIGHT TO ACCEPT SECURITY FOR DEBT OWED BY FELLOW-OFFICER—INCREASE OF SALARIES—RESOLUTION PASSED BY VOTE OF OFFICERS RECEIVING SALARY—INFORMAL MEETING—LOANS TO DIRECTORS PERSONALLY MALUM PROHIBITUM—SUCH ACTS CANNOT BE RATIFIED—LACHES—EVIDENCE—PROOF OF LOSS TO CORPORATION NOT ESSENTIAL.

A surviving officer and stockholder of a domestic business corporation which had consisted of only three members who brings a representative action against the corporation and the representatives of the two deceased members, is not entitled to a judgment compelling the representative of one of the stockholders to turn over to the corporation the amount of a loan which was made by the corporation to a third person who was a relative of the deceased stockholder, where it appears that the loan was made from surplus profits of the corporation which had been accumulated with the consent of all the stockholders, and it is admitted that the borrower, who had paid interest on the loan and greatly reduced it, is herself financially responsible, if the plaintiff had access to the books of the corporation for many years and the loan had appeared on the yearly statements without objection on his part. This, because, even if the loan were *ultra vires*, it was not *mala prohibita*, and the plaintiff, by his silence, had acquiesced in and ratified the same.

It seems, that a business corporation may temporarily loan its surplus funds on safe security when it is inexpedient to distribute them among the shareholders, and even if such loan be *ultra vires* the corporation, it is neither *malum prohibitum* nor *malum in se*, and hence may be ratified by a stockholder.

Nor in such action can the personal representative of one stockholder be required to turn over to the corporation the amount of a debt due from

another deceased stockholder for materials sold to him by the corporation in its line of business, upon a theory that the stockholder whose estate is sought to be held was guilty of a breach of his fiduciary obligations because he accepted an assignment of insurance on the life of the stockholder who purchased the material, as security for a sum owed to him, or because his executors subsequently accepted a conveyance of real estate for the discharge of such indebtedness.

Nor can the surviving stockholder require the representatives of the deceased stockholders to pay back into the treasury of the corporation the amount of an increase in their salaries, as officers, although the increase was made pursuant to a resolution in favor of which said stockholders had voted and against which the plaintiff had registered his vote, where it appears that such salaries were not excessive in the light of the services rendered by the deceased officers and the increase had been paid for many years without active objection on the part of the plaintiff.

The resolution to increase the salary in favor of which the recipients voted was voidable, not void.

It seems, that it was not necessary to call a formal, separate meeting for the purpose of considering the resolution for the increase of salaries, where all of the directors actually met at a special meeting and voted upon the resolution.

But in such action the representatives of the deceased directors may be compelled to pay back to the corporation loans made by it to the directors personally, even though the plaintiff acquiesced in the loans for a long period of time, for such loans were *malum prohibitum*, and could not be ratified.

A recovery of such loans is not barred by the laches of the plaintiff, for laches rest upon estoppel, and, moreover, his action is not barred by laches, but by the Statute of Limitation, which is ten years.

Where the stockholders remained directors of the corporation until their death, the Statute of Limitation did not begin to run against them until that time.

In order to recover illegal loans made to the directors personally the plaintiff need not prove a loss to the corporation, for as a stockholder bringing a representative action he has a right to insist that the illegal acts be undone.

APPEAL by the plaintiff, James Murray, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Westchester on the 29th day

of April, 1914, upon the decision of the court after a trial at the Westchester Special Term.

George W. Elkins (James M. Hunt with him on the brief),
for the appellant.

Robert H. Wilson, for the respondents.

JENKS, P. J.— In 1897 a domestic corporation called Besson & Co. was organized to deal in lumber, coal, wood and building materials. All of the capital stock, 205 shares, was issued to Smith, who gave 40 shares to Murray and 5 shares to Disosway, and there was no change in those holdings until Smith died. These three men became and remained throughout the directors. Smith became president, Murray vice-president and manager, and Disosway, secretary and treasurer. There was no change in these officers until Smith died. The corporation was in the full sense of the word a venture, because the firm of Besson & Co., its predecessor, had become insolvent and was virtually moribund in 1897, so that Smith, its creditor in a large sum, had taken over its business, assumed its liabilities and had caused the organization of the corporation. Naturally enough, these three men seemed to deal with this close corporation as if it were a copartnership. Corporation procedure, observed somewhat for some time, fell into desuetude, and so from 1903 until 1912 there is no record of any meetings of directors or of stockholders, and there is proof that there was none. However, corporation books were kept, and at the end of each year a statement of the condition of the corporation was furnished to each stockholder. The corporation was successful, for although no dividends were paid, yet at the death of Smith it had a surplus of more than \$50,000 and there were no creditors. There seem to have been differences, but there is no proof of any

dissensions while Smith and Disosway were alive; Disosway survived Smith but a few months. After the death of the former, Murray sought to sell his stock to Smith's representatives, but there was no sale. Now, when Smith and Disosway are dead, Murray brings this stockholder's representative action to compel the executors of Smith to pay into the treasury of the corporation, moneys, on the theory that they were taken therefrom by a breach of the fiduciary obligations of Smith to the corporation. The corporation answered, and the defendant executors answered separately, denying some of the allegations of the complaint and pleading acquiescence and ratification and Statute of Limitations. At the close of the case the court thought that upon the proof the plaintiff was not entitled to any relief and dismissed the plaintiff on the merits. The plaintiff accordingly appeals from the judgment. I think that the judgment in its entirety cannot stand.

Some of the transactions for which Smith may be held responsible are of such a character, especially as *mala prohibita*, that the defenses of ratification or acquiescence, or in view of the circumstances the defense of the Statute of Limitations are not available, while others of the transactions are open to the defense of ratification and acquiescence. The discussion is naturally divided by these two classes, and I shall consider first the transactions that are immune from this attack by this stockholder. The trial court made many findings, but it is unnecessary to reproduce them or to epitomize them now, inasmuch as I shall discuss the facts later on as they are supported by proof, and, therefore, justly found by the court. The court found without exception that, prior to May 2, 1899, Ellen W. Besson, a connection by marriage of the said Smith, received about \$6,600 moneys of the corporation, and that such moneys were loans. The loans were entered and carried on the books of the corporation, but there is no record of the manner, or of any corporate procedure, if there were any, whereby this money

was lent to Mrs. Besson. The court found without exception that this money had been taken from the treasury of the corporation, and the record, though vague, indicates that the time was in 1899. In the absence of all other proof which, were the fact otherwise, would have been forthcoming (for none knew the affairs and details of the corporation better than the plaintiff, as I shall presently show), we may infer that this money was taken from the surplus moneys of the corporation. It has been held that corporations "may temporarily lend their surplus funds on safe security when it is inexpedient to distribute them among the shareholders." (Morawetz Priv. Corp. [2d ed.] § 367; Cook Corp. [6th ed.] § 681; Garrison Canning Co. v. Stanley, 133 Iowa, 57, 60, and cases cited. See, too, the intimation in McFarlan v. Triton Ins. Co., 4 Den. 392, 397.) There is no proof that it was expedient then or at any other time to distribute the surplus, which at the time of Smith's death was, as I have said, more than \$50,000. There is no proof that there was any distribution at any time, or that dividends were ever paid, and there is no proof that the plaintiff or any other of the two stockholders suggested or asked for distribution or for dividends. Thus it appears that this policy of conserving the surplus was acquiesced in by all of them. Mrs. Besson paid interest on the loan and reduced it. She owned the premises wherein the corporation carried on business, and the plaintiff admitted that she was financially responsible and abundantly able to pay this debt. There is a distinction between a temporary loan of the surplus funds of a corporation when not otherwise required, and the practice of lending the moneys of the corporation as if the corporation were a bank. And it is to be noted that section 25 of the former Stock Corporation Law (Gen. Laws, chap. 36; Laws of 1892, chap. 688), which is now section 29 of the Stock Corporation Law (Consol. Laws, chap. 59; Laws of 1909, chap. 61), prohibits a loan of any moneys to *stockholders*. Even if such a

loan was *ultra vires* the corporation, it was not otherwise illegal and it was neither *malum prohibitum* nor *malum in se*. (See *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Bissell v. M. S. & N. I. R. R. Cos.*, 22 id. 258, 269.) But whichever view we may take of the transaction, whether it was legal or *ultra vires*, I think that the plaintiff cannot prevail in this feature of the case for the reasons that I shall give only later on, inasmuch as they obtain as to other transactions. I attach little importance to the fact that the loan charged on the books to Mrs. Besson was changed afterwards, at the instance of Smith, to Mr. Besson, who, apparently, was not financially responsible. The plaintiff does not pretend to say that he was misled by the said change in the books. And Mrs. Besson with the consent of the plaintiff, in lieu of testifying, but over objection as to competency, materiality and relevancy, filed at trial her formal acknowledgment that the loan was made to her, that the reductions were made and the interest was paid by her, that the obligation was hers, with the promise to discharge it with interest.

The said Disosway bought building materials from the corporation. He was a resident of Dobbs Ferry, where this corporation carried on its business. He was reputed to be a man of wealth and of property, interested in several shops and possessed of realty in the county of Westchester. He bought the materials for improvement of his property. He was treated as was any other customer, and charged with the purchases on the books in an account which had amounted to \$50,000. There is no proof of any discrimination in his favor in prices, terms or credits. There is no indication that the extension of credit to him was other than a fair risk of business. At the time of Smith's death, Disosway had reduced his debt to less than \$7,000. It was not shown that this was uncollectible. Such purchases were voidable, not void. (*Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.) It is contended that Smith was

answerable for such balance, not only on account of the relationship of Disosway with the corporation, but also because Disosway, being personally indebted to Smith, had assigned his life insurance policy of \$5,000 to Smith as security, which was collected by Smith's executors; and because, in December, 1911, Disosway and his wife conveyed certain realty to Smith's executors on account of the said indebtedness to Smith. In the first transaction Smith himself had but taken security, and in the second transaction Smith, of course, had no part. I think that there was no breach of Smith's fiduciary obligation as a director in that he secured security for a personal debt due from one who had an account with or was indebted to the corporation.

At the inception of the corporation in 1897, the salaries of Smith as president, the plaintiff as vice-president and manager, and of Disosway as secretary and treasurer, were made \$100, \$1,200 and \$100 a year respectively. In 1903 Smith's salary was increased to \$3,000, and Disosway's salary was increased to \$1,200. The plaintiff voted against the resolution for such increases, and his contention is that he is entitled to have paid into the treasury of the corporation all moneys drawn by Smith and by Disosway which represent their increased salaries. That contention rests upon two grounds: *First*, that the resolution of such increases required the vote of Smith and of Disosway, and *second*, that the salaries in the amount paid were excessive and a fraud upon the corporation. This specification as to the vote is correct, for Smith, the plaintiff and Disosway constituted all of the stockholders and all of the directors of the corporation. But I think that this action was voidable, not void. (Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152, 162, citing 10 Cyc. 790; Barr v. N. Y., L. E. & W. R. R. Co., 125 N. Y. 274, 275; Godley v. Crandall & Godley Co., 212 id. 121, 132; Carr v. Kimball, 153 App. Div. 839.) The by-laws committed authority over salaries to the directors; the vote of the increase is recorded as taken at a special meeting of stockholders, at

which all of the stockholders were present and consequently all of the directors, for they were one and the same. No point is made as to formalities, and I think it is unimportant, inasmuch as all of the directors actually voted on the resolution; in other words, it was not essential in this instance that the directors should hold a separate meeting at that time for that purpose. (See *Elyea v. Lehigh Salt Mining Co.*, 169 N. Y. 33; *Cook Corp.* [6th ed.] § 606, and notes.) And I think that the trial court was right in finding that this salary was proper and that the increase worked no wrong upon the corporation. The original salary of \$100 to Smith is no criterion. For the corporation was formed to take over the business of an insolvent and apparently moribund firm. Smith was the principal owner of the corporation. The venture was practically his venture. He was a merchant in New York city and engaged there as the president of a large corporation. He did not know whether the corporation would fail where the firm had failed. He could not forecast how much of his time and attention would be required by this business. The value of his services as president is not to be measured by his attendance at the office or at the place of business. It is true that he went rarely to Dobbs Ferry, but he kept in constant touch with affairs through bi-weekly visits by Disosway, its secretary, treasurer and bookkeeper. He lent to the corporation his financial strength, he guaranteed its commercial paper, he advised as to its accounts and credits, and it may be inferred that he directed generally its conduct. And this fact stands out: that where the firm of Besson & Co., with the plaintiff as a partner, had failed, the corporation of Besson & Co., with Smith as its president and in control, succeeded. And when this increase of salary was made the corporation had shown success, and had accumulated a considerable surplus. Disosway was first its secretary and its treasurer, but later on took over the duties of the bookkeeper,

who was discharged. He attended at the office daily and did his work. The salary of \$1,200 seems fair and just.

The question presented in this case is, not whether a stockholder had such a remedy, but whether this stockholder had it at the time he invoked it. The plaintiff, as we have seen, was a stockholder from the outset until the death of Smith, and for the same period he was vice-president, director and the manager. He devoted his entire time to the business at Dobbs Ferry. The books of the corporation were kept in its office at that place, were open to him, and were looked into frequently by him. They showed the loan to Mrs. Besson in specific terms. The plaintiff received at the close of each year statements of the corporate affairs in detail, that specified the loan, and he admits that he examined the statements and understood them, for he had been a bookkeeper. If we believe that he did not know of the loan to Mrs. Besson before or at the time it was made in 1899, that he did not learn of it from the books wherein it was entered — and our credulity is taxed when we remember his close association with this close corporation — we must believe that he knew of the loan when he received, read, examined and understood the annual statements wherein it was set forth. In any event the law will impute such knowledge to him. He knew of the increase of salaries in 1903, for he voted against the resolution, and he must have known, or was legally chargeable with knowledge, that these salaries were paid inasmuch as these annual statements contained this information. He knew of the sales to Disosway, because the sales were executed under his direction as manager and were entered regularly upon the books. Now, there is not a bit of evidence that at any time he ever demurred, objected or protested against any of these transactions or sought rectification or redress, save that he voted in 1903 against the increased salaries. It might well have been that protest or objection, or the seeking of relief within the corporation, would have been unavailing, but in any

event he could have invoked the courts. How can he be heard to say that he was cowed by Smith, when he was independent enough to vote against Smith on the questions of the discharge of John Besson, the discharge of the bookkeeper, the substitution of Disosway for him and the increases of the salary, including that made for Smith himself?

The doctrine of acquiescence, as said in *Lowndes v. Wicks* (69 Conn. 15, 30), is "Well defined as quiescence under such circumstances that assent may be reasonably inferred from it." (2 Pom. Eq. Juris. [3d ed.] § 965 and note; *Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113, 129; *Kent v. Quicksilver Mining Co.*, *supra*.) Upon the authorities cited, to which I may add *Hoyt v. Latham* (143 U. S. 553) and *Klein v. Independent Brewing Assn.* (231 Ill. 594), I think that the plaintiff must be held to acquiescence as to these said transactions. (See, too, *Morawetz Corp.*, *supra*, § 262, note 2.)

But, as I have said, there are other transactions as to which this judgment should not be affirmed. Between January 1, 1907, and the time of his death, Smith withdrew moneys from the corporation which at the latter period amounted with interest to \$12,614.97, and prior to Smith's death Disosway had become indebted to the corporation for money received, which, according to the statement of January 1, 1911, amounted to \$3,637.47. The court has found without exception that these moneys represent loans to these two persons. These moneys were entered and carried on the corporate books as such loans. These loans were made to these stockholders individually, and it must be presumed that they were for their own advantage. Therefore such use of the funds of the corporation was a breach of duty on the part of Smith (*Pollitz v. Wabash R. R. Co.*, 207 N. Y. 113), and it was *malum prohibitum*. (Stock Corp. Law [Gen. Laws, chap. 36; Laws of 1892, chap. 688], § 25; re-enacted by Stock Corp. Law [Consol. Laws, chap. 59; Laws of 1909, chap. 61], § 29.) Such use if *malum prohibitum* was

impossible of ratification, because ratification is as objectionable to that which is *malum prohibitum* as was the original offending. (Pom. Eq. Juris. [3d ed.], § 964, note; Schwab v. Potter Co., 194 N. Y. 409, 419; Continental Securities Co. v. Belmont, 206 id. 7, 18.) Having in mind the decision and discussion in Pollitz's case (*supra*), one may say that if the defense of acquiescence rest upon the principle of ratification, then there could be no ratification of an act *malum prohibitum*, and if it rest upon the principle of estoppel, no new rights have arisen or could have arisen as to these borrowers since such loans were made. So far as laches is concerned, laches rests upon estoppel (Cook Stock & Stockh. [2d ed.], § 731, and authorities cited), and the cause of action is barred, not by laches, but by the Statute of Limitations. (Pollitz v. Wabash R. R. Co., *supra*, 130.) The Statute of Limitations applicable would be that of 10 years.* (Brinckerhoff v. Bostwick, 99 N. Y. 185.) But as Smith remained a director of the corporation up to the time of his death in 1911 (Gen. Corp. Law [Gen. Laws, chap. 35; Laws of 1892, chap. 687], § 23; re-enacted by Gen. Corp. Law [Consol. Laws, chap. 23; Laws of 1909, chap. 28], § 28), I think that the statute did not begin to run prior to that time. (Zebley v. F. L. & T. Co., 139 N. Y. 461, 469; Ludington v. Thompson, 153 id. 499; National Bank of Commerce v. Wade, 84 Fed. Rep. 10.) Whether plaintiff acquiesced at the time these loans were made, or knew of them at the time they were made, we do not know. But it is clear enough that he knew of them, or at least is chargeable with legal knowledge thereof, for a number of years. But, nevertheless, I think that he is not barred from relief. Story in his Equity Jurisprudence (13th ed., § 298) writes: "In cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstances that the relief is

* See Code Civ. Proc. § 388.—[REP.]

asked by a party who is *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party."

The learned counsel for the appellant calls to our attention that there is no loss to the corporation by the loans to Smith or to Ellen W. Besson, but I think that proof of loss to the corporation was not essential. The stockholder in such an action has the right to insist that the illegal act be undone. (*Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336; *Schwab v. Potter Co.*, *supra*.)

The judgment must be modified so that the plaintiff recover for the corporation the amounts of the loans to Smith and to Disosway, with interest, and consequently the findings that are to the contrary are disapproved and appropriate findings will be made in their stead; and when the judgment is thus modified it will be affirmed, without costs to either party. The parties must submit proposed findings to this court within twenty days.

BURE, THOMAS, CARR and RICH, JJ., concurred.

Judgment modified in accordance with opinion by JENKS, P. J., and as so modified affirmed, without costs to either party. Parties must submit proposed findings to this court within twenty days. Order to be settled before the presiding justice.

In the Matter of the Judicial Settlement of the Accounts of
JAMES W. OSBORNE, as Executor and Trustee under the Last
Will and Testament of EUGENE LA GROVE, Deceased.

JAMES W. OSBORNE, as Executor and Trustee, etc., Appellant;
IVY LEE LA GROVE and Others, Respondents.

(*Supreme Court, Appellate Division, Second Department, March 12, 1915.*)

TRUST—RIGHT OF TRUSTEE TO APPEAL FROM DECREE IN FINAL ACCOUNTING—CORPORATIONS—BASIS FOR DECLARATION OF STOCK DIVIDEND—WHEN RIGHT TO STOCK DIVIDEND VESTED.

The fact that on an accounting by a trustee the life tenant and her husband, father, mother, brother and sisters, being all the persons entitled to the remainder, appeared, but all failed to appeal, is not a ground for a dismissal of an appeal by the trustee, as the remainders may be contingent.

Where directors of a corporation *after* directing a stock dividend which had previously been authorized by the stockholders at the same meeting adopt a resolution authorizing a cash dividend out of the profits of the corporation, the amount of the cash dividend should not be considered as having been deducted from the surplus of the corporation used as a basis for the declaration of the stock dividend.

The right to a stock dividend becomes vested when it is authorized even though the certificates are actually delivered thereafter.

APPEAL by James W. Osborne, as executor and trustee, etc., from part of a decree of the Surrogate's Court of the county of Kings, entered in the office of said Surrogate's Court on or about the 18th day of June, 1914.

Gilbert D. Lamb (Robert D. Petty with him on the brief), for the appellant.

Jerry A. Wernberg, for the respondents.

CARR, J.— This is an appeal from a decree of the Surrogate's Court in Kings county. It is the last phase of a litigation

which has been before this court in 153 Appellate Division, 312, and before the Court of Appeals in 209 New York, 450. In the Court of Appeals certain rules were declared as to the apportionment of a corporation stock dividend between a life tenant and the trustee of a fund held for her life, with remainder over on her death to such persons as would take her property at her death under the Statute of Distributions. She is yet alive, and she has a husband, a father, mother, brother and sisters. The remainder seems to us contingent, as none of these persons may survive the life tenant, in which event her next of kin would take directly and not by representation. All these persons were brought into the accounting proceeding, none of them has appealed and, therefore, the life tenant urges that this appeal by the trustee should be dismissed. We think this contention is not good under the facts of this case.

The Singer Sewing Machine Company declared a stock dividend in which this estate is interested to the extent of 2,920 shares. Under the decision of the Court of Appeals, this stock dividend is apportionable between the life tenant and the trustee in proportions depending upon the amount of the surplus of the corporation at the time the stock dividend was authorized. The life tenant claims 652 722/1000 shares; while the trustee contends that the life tenant is entitled to but 527 722/1000 shares. As the shares of this corporation are very valuable, the money value in dispute is very substantial.

The controversy arises as follows: On June 2, 1910, the directors of the Singer Company adopted a resolution to call a special meeting of the stockholders to pass upon the question of a stock dividend; on June sixteenth the special meeting of the stockholders authorized the stock dividend and "*to issue forthwith* in payment thereof certificates of fully paid non-assessable stock to the stockholders of record at this date in the amounts in which they are respectively entitled to the same." On June seventeenth the directors met and declared

the stock dividend, and directed the certificates "to issue forthwith."

As a matter of fact, the certificates were not delivered until some days later. There is no dispute as to the law by either counsel, that the right to the stock became vested when the dividend was authorized, even though the certificates were actually delivered later. If there was no other circumstance in this case then the surplus of the corporation would be computable at the time the stock dividend was authorized, and the life tenant would be right incontestably in her claim as to the proportion of the stock dividend to be allotted to her. However, at the same meeting of the directors of the Singer Company, but *after* the stock dividend was authorized, a resolution was adopted authorizing a cash dividend of the sum of \$1,800,000 out of the profits of the corporation. The trustee contends that as both resolutions were adopted at the same meeting they must be considered as but one transaction, and that the amount of the cash dividend of \$1,800,000 must be considered as having been deducted from the surplus of the corporation as a basis for the declaration of the stock dividend. We think not. The cash dividend was declared by the directors in the fullness of their power as directors. The stock dividend was authorized by the stockholders at a prior special meeting and in making the stock dividend the directors but carried out the authorization of the stockholders, and when that dividend was declared the transaction was consummated and all rights were vested. The subsequent declaration by the directors of a cash dividend, later in order, is not to be transferred from its actual order, so as to give it an effect qualifying the declaration of the stock dividend. The facts are unusual and no direct precedents are cited by any party to the appeal.

The decree of the Surrogate's Court of Kings county, in so far as appealed from, should be affirmed, with costs to the trustee and the life tenant, payable out of the estate.

BURR, THOMAS and RICH, JJ., concurred; JENKS, P. J., taking no part.

Decree of the Surrogate's Court of Kings county, in so far as appealed from, affirmed, with costs to the trustee and the life tenant, payable out of the estate.

In the Matter of the Probate of the Last Will and Testament
of ELLEN M. BENNETT, Deceased.

FLORA GRAY SMITH, Appellant, v. BENJAMIN F. FERRIS and
Others, M. Respondents.

(*Supreme Court, Appellate Division, Fourth Department, March 3, 1915.*)

WILL—REVOCATION—PRESUMPTION WHERE WILL CANNOT BE FOUND—EVIDENCE—CONTENTS OF LOST WILL—WHEN COMMUNICATIONS TO ATTORNEY NOT PRIVILEGED.

Where a will which in terms revoked all prior wills was delivered to the testatrix and it cannot be found after her death or its whereabouts accounted for, it is presumed that it was destroyed by her with an intention to revoke it.

Where directions for the preparation of a will were given by the testatrix to an attorney in the presence of a third person, her friend, and the will when drawn was read to the testatrix in the hearing of said person, the attorney after the death of the testatrix is competent to testify both to the execution of the will and to the fact that it contained a clause revoking all former wills, for under such circumstances the prohibition contained in section 835 of the Code of Civil Procedure does not apply.

APPEAL by Flora Gray Smith, legatee, from a decree of the Surrogate's Court of the county of Steuben, entered in the office of said Surrogate's Court on the 18th day of March, 1914, denying probate to an instrument in writing purporting to be the last will and testament of Ellen Bennett, deceased.

Milo M. Acker, for the appellant.

Robbins, Brown & Phillips (Fred A. Robbins of counsel),
for the respondent Benjamin F. Ferris.

Shultz, Stevens & Cameron (Fred A. Robbins of counsel),
for the respondent Elizabeth A. Meyers.

PER CURIAM.— We are satisfied that the evidence shows that the instrument presented by the petitioner, the appellant herein, for probate as the last will and testament of Ellen M. Bennett, deceased, bearing date October 16, 1905, was revoked by a subsequent will duly made and executed by the testatrix on or about March 16, 1908, which last-mentioned will contained a clause revoking all former wills made by her. The evidence further shows that this last will after its execution was by testatrix's direction retained by the attorney who drew it, in whose custody it remained for some two years; and at her request it was then delivered to her. What afterwards became of it is not shown; but, as it could not be found, the presumption is, under the circumstances, that it was destroyed by her with the intention of revoking it. (*Collyer v. Collyer*, 110 N. Y. 481; *Matter of Kennedy*, 167 id. 163.)

A material part of the evidence, by which contestants sought to establish the execution of the later will, and the fact that it contained the revocation clause, was given by the attorney, who, at the request and by direction of deceased, drew it. This evidence was duly objected to by the petitioner as calling for the disclosure of a communication between an attorney and his client, disclosure of which by the attorney was prohibited by section 835 of the Code of Civil Procedure, and exception duly taken to its admission. If, therefore, the attorney was, under the circumstances of this case, prohibited by the section referred to from disclosing the contents of that will, then the erroneous

admission of his evidence would necessarily require the reversal of the decree. But it appears that, while the attorney was not a witness to the will, yet the directions for its preparation were given him by the deceased in the presence of a third person, Mrs. Taft, a friend of deceased, whom she had requested to accompany her to the attorney's office, and that after the will was prepared by him he read it aloud in the presence and hearing of both Mrs. Taft and the deceased. Mrs. Taft was a witness to the execution of this will, and she, as well as the attorney, gave evidence as to its execution. Under these circumstances the communications between the attorney and his client do not partake of that confidential character, nor is the relation occupied by the attorney and client in regard to such communications of the confidential nature, disclosure of which is prohibited by the section above referred to. (*Baumann v. Steingester*, 213 N. Y. 328.) This court has also so held in two cases in which the same question arose. (See *Matter of Barnes*, 70 App. Div. 523; *Matter of Eckler*, 126 id. 199.)

The failure of contestants to produce the other subscribing witness for examination on the hearing was sufficiently explained.

The decree should be affirmed, with costs to respondents payable out of the estate.

All concurred.

Decree affirmed, with costs to respondents payable out of the estate.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Suing in Its Individual Capacity and as Administrator, etc.,
of ALEXANDER McDONALD, Deceased, Appellant, v. EDMUND
K. STALLO and Others, Respondents, Impleaded with THE
ALABAMA SECURITIES COMPANY and Others, Defendants.
(No. 1.)

(Supreme Court, Appellate Division, First Department, March 12, 1915.)

**EXECUTORS AND ADMINISTRATORS—JURISDICTION OF SUPREME COURT TO
 RESTRAIN PROCEEDING IN SURROGATE'S COURT FOR REMOVAL OF ADMINIS-
 TRATOR PENDING SUIT FOR AN ACCOUNTING—SECURED CREDITOR MAY ACT
 AS ADMINISTRATOR.**

An administrator which at the time of its appointment was a creditor of the estate, holding collateral security for its debt, brought suit both in its individual and in its representative capacity against all persons having any claim against the estate for an accounting to determine its liability to the estate, and incidentally to procure an adjustment of many conflicting claims to the proceeds of the collateral security which it had sold, and also to other securities. Immediately after the commencement of this suit one of the next of kin of the intestate instituted a proceeding in the Surrogate's Court for the removal of the plaintiff as administrator upon the ground that it had mismanaged the estate.

Held, that an application by the administrator for a temporary injunction restraining the prosecution of the proceeding in the Surrogate's Court for its removal during the pendency of the suit for an accounting should be granted, especially since the administrator is financially able to respond to any judgment fixing its liability to the estate, and any failure in its duty as administrator has already been accomplished, and since the assets will not be liable to any loss or diminution.

A secured creditor of an estate is not disqualified from acting as administrator.

LAUGHLIN and McLAUGHLIN, JJ., dissented, with opinion.

APPEAL by the plaintiff, Metropolitan Trust Company of the City of New York, individually and as administrator, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county

of New York on the 25th day of August, 1914, denying its motion for an injunction *pendente lite* herein, and also from an order entered in said clerk's office on the 26th day of October, 1914, resettling the prior order.

Also an appeal by the plaintiff from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 31st day of August, 1914, granting the defendant Laura McDonald Stallo's motion to vacate the temporary injunction contained in the order to show cause herein.

John G. Milburn of counsel (Walter F. Taylor with him on the brief), for the appellant.

Nash Rockwood of counsel (Rockwood & Haldane, attorneys), for the respondents.

SCOTT, J.— The nature of this action and the relief sought therein are stated at length in the opinion handed down herewith on appeal from an order sustaining a demurrer to the complaint. (Metropolitan Trust Co. v. Stallo, No. 2, 166 App. Div. 649.) For the purpose of this opinion it is sufficient to say that plaintiff is the administrator of the estate of Alexander McDonald, deceased; that it was at the time of its appointment a creditor of the estate holding collateral security for its debt; that it had sold such security for the payment of its claim, and that it now holds a part of the proceeds of such sale, as well as certain securities with reference to which claims have been made by persons other than the estate or those ultimately entitled to it. The judgment sought is a general accounting in which it may be ascertained with what plaintiff is chargeable, in cash or securities, as administrator, and what valid claims, if any, are held by any of the defendants against money or securities in plaintiff's hands which are apparently assets of the estate for

which it is administrator. It seems to be quite plain that every question respecting the amount of the estate, the valid claims against it and the liability of plaintiff for its acts or failure to act as administrator can be raised and determined in this action, and it is not easy to see how they can all be determined otherwise than in this or some similar action except by a series of actions, which latter course would inevitably result in much confusion and probably great expense to the estate.

Immediately after this action had been commenced the defendant Laura McDonald Stallo, one of the two next of kin of the intestate, instituted a proceeding in the Surrogate's Court for the removal of plaintiff as administrator of the estate of said Alexander McDonald, deceased. An order was subsequently made by the Surrogate's Court granting the prayer of the petitioner. This order was reversed for reasons not affecting the question now under consideration. (*Matter of McDonald*, 160 App. Div. 86; 211 N. Y. 272.) By the orders entered on the appeal referred to the whole matter was remitted to the Surrogate's Court, which, as is conceded, has sole and exclusive authority, in the first instance, to act upon a petition for the removal of an administrator.

The present application is for a temporary injunction restraining the defendant Laura McDonald Stallo from prosecuting, during the pendency of this action, the above-mentioned proceeding instituted by her for the removal of this plaintiff as administrator as aforesaid, and from instituting or prosecuting any other action or proceeding concerning or affecting any of the matters set forth in the complaint herein.

The authority of the Supreme Court sitting as a Court of Equity, and indeed its duty, in a proper case, to stay proceedings in another court is so well established that it will not be questioned. The only inquiry is as to when a proper case is presented. (*See Erie Railway Co. v. Ramsey*, 45 N. Y. 637; 4 N. Y. Annot. Dig. 948.) Nor is it an insuperable objection

to such an injunction that it restrains the prosecution of proceedings as to which the Surrogate's Court has concurrent or exclusive jurisdiction. (*Pettigrew v. Foshay*, 12 Hun, 483; *Van Sinderen v. Lawrence*, 50 id. 272; *Schlesinger v. Schlesinger*, 157 App. Div. 633.)

While the jurisdiction and authority of the Supreme Court to restrain the prosecution of proceedings in other tribunals are not necessarily determined by the priority of institution, the case for such restraint is much strengthened when, as in this case, the commencement of the action in the Supreme Court antedates the commencement of the action or proceeding sought to be enjoined. In *Schuehle v. Reiman* (86 N. Y. 270), the Court of Appeals said: "Where the object of two legal proceedings is the same, convenience as well as a proper regard for the rights of debtor and creditor require if possible that the fund in which both are interested should be subjected to diminution by one litigation only, and the parties themselves spared the unnecessary labor and expense of conducting two controversies over the same matter. It would seem also that if both tribunals, whose interference has been invoked, have equal or concurrent jurisdiction, it should continue to be exercised by that one whose process was first issued."

In *Ludwig v. Bungart* (48 App. Div. 613), the present chief judge of the Court of Appeals writing for the Appellate Division said: "While it has many times been held that the Supreme Court may properly decline to take cognizance of a matter over which the Surrogate's Court has concurrent jurisdiction, such refusal does not seem to be authorized, unless the jurisdiction of the Surrogate's Court has already been invoked. The rule is that where both tribunals have equal jurisdiction, the cause should be retained and disposed of in the forum where judicial action was first sought."

To the same effect are *Garlock v. Vandevort* (128 N. Y.

374); Matter of Farrell (125 App. Div. 702) and many other cases.

In considering whether the case at bar presents a proper occasion for the exercise of this undoubted jurisdiction of the Supreme Court we may properly look at the grounds set forth in the petition as a reason for the removal of the administrator, not for the purpose of passing upon the sufficiency of those grounds, for that is a matter to be passed upon by the Surrogate's Court, but for the purpose of determining the imminence of the necessity, if necessity there be, for the consideration of the question whether or not the administrator should be removed.

It is to be noted in the first place that there is no suggestion anywhere that plaintiff is not amply able to respond to any judgment or order which may be made fixing the amount for which it is liable to account, and no claim is made that the assets of the estate are liable to loss or diminution by reason of the insolvency of plaintiff. By reference to the petition it appears that the sole ground upon which the removal of the administrator is sought is the claim on the part of the petitioner that plaintiff, occupying the dual position of administrator and secured creditor, failed to credit upon said loan certain sums which should have been credited thereon; sold the collateral securing such debt in violation of an alleged oral agreement to extend the due date of said debt, and improvidently or wrongfully sold said collateral securities at a less price than should have been obtained for them. Thus it appears that every failure or dereliction of duty charged against plaintiff as administrator is something which has already been fully accomplished, and that the questions presented as arising therefrom are questions which can be appropriately raised and disposed of in this action, the principal object of which is to judicially and finally determine for what plaintiff is chargeable to the estate of which it is administrator. The gravamen of the peti-

tion is contained in its 28th and 29th paragraphs, which follow the somewhat detailed statement of the several derelictions from duty charged against the administrator. These paragraphs read as follows:

"XXVIII. That said Metropolitan Trust Company admits a part of your petitioner's claim and denies the remainder, and that your petitioner and said Metropolitan Trust Company are unable to arrive at an agreement as to the amount of its liability and it is necessary to sue said Metropolitan Trust Company for an accounting, for which reason it is necessary that some person not interested adversely to your petitioner should be appointed administrator of the estate of said Alexander McDonald, who will bring suit forthwith against said Metropolitan Trust Company for an accounting and for damages.

"XXIX. That said Metropolitan Trust Company occupies a dual position of administrator and creditor of said estate and is not in position to properly protect the rights and interests of your petitioner in said estate. Said trust company in selling and disposing of said securities as herein stated has failed to protect the interests of the estate of said deceased, and has recklessly and wilfully caused loss and damage thereto, and has disregarded its duty as administrator, and has thereby derived large pecuniary advantage."

It thus appears that the purpose sought to be achieved by the removal of plaintiff as administrator is to afford an opportunity to charge plaintiff with the loss suffered by the estate in consequence of its mismanagement of the estate, or its wrongful acts in relation thereto. We are unable to see any reason why the petitioner and her sister will not be in a perfect position to raise any such question as they may be advised in the present action. The natural result of superseding plaintiff as administrator would be to require it to account to the new administrator. Upon such an accounting these questions would at once present themselves and have to be passed upon. They can

equally well be raised and passed upon in this action, but the other questions in which other defendants are interested could not be determined in an accounting proceeding in the Surrogate's Court. It cannot be questioned that the Supreme Court is a tribunal better equipped than the Surrogate's Court to determine such a claim as that which petitioner says she wishes to assert against plaintiff and which is the real ground upon which she seeks plaintiff's removal. Yet it is quite possible and even probable that the action of the surrogate upon the petitioner's application would operate as *res adjudicata* of that very serious question. (Demarest v. Darg, 32 N. Y. 281; Culross v. Gibbons, 130 id. 447; Leavitt v. Wolcott, 95 id. 212; Smith v. Zalinski, 94 id. 519.)

The mere fact that plaintiff was at one and the same time administrator of the estate and a creditor thereof is not alone a legal objection to its acting as administrator. It was a creditor when it was appointed, and very probably was selected as administrator for that very reason. At all events there is no inconsistency in the two relations. Upon the whole we see many reasons why the prosecution of the action for plaintiff's removal as administrator should be stayed until final judgment in this action, and we find no reason in the interest of the estate why it should not be.

In this action an opportunity is afforded, such as could not be afforded in any proceeding in the Surrogate's Court, to litigate every question that any person interested in the estate may desire to raise, and, so far as any allegation is made to the contrary, the continuance of plaintiff in office as administrator during the pendency of this action will not subject the estate to jeopardy of loss or depreciation. A proceeding to remove an administrator is not one to punish him but to protect the estate. (Matter of Monroe, 142 N. Y. 484, 491.) In that case the administrator was also a secured creditor of the estate, and the charge against him was similar to that made against the plain-

tiff, to wit, that he had been guilty of wrongdoing, to the damage of the estate, in realizing upon the collateral securities. Referring to that charge the Court of Appeals said: "The mere fact that the interest of the administrator individually was opposed to that of the estate in the transaction now under consideration presented no embarrassment and did not require his removal from office. A proper plaintiff could have invoked the aid of a court of equity, making the interested parties defendants, and the rights of all would have been fully protected." This opinion is peculiarly opposite to the present appeal.

The orders appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs.

INGRAHAM, P. J., and CLARKE, J., concurred; McLAUGHLIN, and LAUGHLIN, JJ., dissented.

LAUGHLIN, J. (dissenting).—It is quite clear and is conceded that the respondent Laura McDonald Stallo instituted on sufficient charges properly presented (see *Matter of McDonald*, 160 App. Div. 86; *affd.*, 211 N. Y. 272) a proceeding in the Surrogate's Court, in which the appellant was appointed administrator of the estate of Alexander McDonald, deceased, for the removal of appellant as such administrator, and that the Surrogate's Court has sole and exclusive authority to determine such charges and to remove the administrators.

The administrator sought by an application for an injunction in this action to restrain said respondent from prosecuting the proceeding in the Surrogate's Court, pending this action, which would enable it to remain in charge of this action as administrator, and to so mold and present the same as to further its individual interest as a creditor of McDonald at the expense of his estate, for it brings the action in the dual capacity for itself and as representing the estate, and in both capacities is asking

the court to ratify and confirm its acts upon which the charges for its removal are predicated. When in *Matter of McDonald* (*supra*) this court and the Court of Appeals remitted the matter to the Surrogate's Court to proceed with the charges it appeared quite as fully as now that the alleged acts of misconduct and of hostility to the estate on the part of the administrator had been performed, and that the administrator was able financially to answer to those interested in the estate, and if that were a sufficient reason for not removing the administrator there would have been no occasion for ordering the charges heard. Moreover, it now further appears that the administrator in bringing this action for the judicial approval of its alleged acts of misconduct is further proceeding in hostility to the interests of the estate which constitutes further ground for its removal. (See *Lichtenberg v. Herdtfelder*, 103 N. Y. 302; *Matter of West*, 40 Hun, 291; *affd.*, 111 N. Y. 687; *Matter of Gleason*, 17 Misc. Rep. 510. See, also, *Pyle v. Pyle*, 137 App. Div. 568; *affd.*, 199 N. Y. 538.) In *Matter of Moulton* (32 N. Y. St. Repr. 631) the Surrogate's Court in the exercise of its discretion had refused to revoke the letters of administration, and the order was affirmed on the ground that the facts disclosed did not as matter of law require the removal of the administrator, and that the judicial discretion had not been improperly exercised. By appealing from the order denying the motion, the appellant is now asking this court, which has no jurisdiction to hear such charges or to remove an administrator, in effect to enjoin the Surrogate's Court from exercising its statutory functions in performing its statutory duties, notwithstanding the charges, which if true show that the administrator has violated its trust and that its interests are diametrically opposed to those of the estate and that it should be removed at once in order to permit a disinterested representative to take charge of the interests of the estate involved in, or that may be affected by, the action. It is no answer to this contention to say that

those interested in the estate are parties defendant herein and may thus, in representing themselves, indirectly protect the estate, for the Surrogate's Court may well deem that they are entitled to have the estate represented by a disinterested administrator and to have the expenditures made by it in prosecuting or defending actions inure to the benefit of the estate and not to its individual advantage and to the detriment of the estate.

If, in the circumstances of this case, it be within the jurisdiction of the Supreme Court thus indirectly to enjoin the proceeding in the Surrogate's Court, I think it would be an undue exercise of jurisdiction to do so, for the basis required to be shown by the provisions of section 604 of the Code of Civil Procedure for granting such relief does not exist here. The case here presented is one in which said respondent might well have asked for a stay of proceedings in this action until the determination of her application for the removal of the administrator. It is, of course, competent for a court of general jurisdiction to enjoin proceedings in a court of concurrent jurisdiction, where the issues are the same and may all be determined in the court of general jurisdiction; but there is, I think, no precedent for issuing an injunction in an action pending in a court of general jurisdiction, in effect, enjoining proceedings in an action or proceeding in another court having exclusive jurisdiction of the subject-matter sought to be restrained, and if it be within the jurisdiction of the Supreme Court to so extend the doctrine, I think it should not be done, for no emergency requires it. (See *Paxton v. Patterson*, 26 Abb. N. C. 389; *Savage v. Allen*, 54 N. Y. 458; *Hamilton v. Cutting*, 60 App. Div. 293; *Wallack v. Society, etc.*, 67 N. Y. 23; *Norfolk & New Brunswick Hosiery Co. v. Arnold*, 143 id. 265; *Edgell v. Clarke*, 19 App. Div. 199.) It may be said that the appellant is not asking that the proceeding in the Surrogate's Court be enjoined, and that there is no attempt to prevent that court

from exercising its statutory functions. But if the petitioner in that proceeding be enjoined from prosecuting it, that enjoins the proceeding as effectually as if the injunction ran against the court. The learned counsel for the appellant contends that the issues arising on the charges against it in the Surrogate's Court are in part the same as those which will arise herein, and that if the proceeding for the removal of the administrator be not enjoined, findings may be made therein that will be binding herein. The learned counsel for the respondents claims that none of the issues will be the same, and that no finding in the proceeding for the removal of the administrator will be conclusive on any fact. It is unnecessary to consider the merits of the respective contentions on that point, for I regard it as immaterial to the decision of the question now presented. There is no presumption that the Surrogate's Court, in so far as it is authorized to determine questions of fact, is not as competent to do so as any other court. If, however, the appellant prefers to be assured that none of the questions of fact in this action involved herein shall be determined in the Surrogate's Court, it has only to resign as administrator to accomplish that result, and if it shall so resign, I think its successor should be enjoined, pending this action, from requiring it to account, at least with respect to any matters at issue or involved herein, or during the pendency of any other action brought in a court of competent jurisdiction to determine them, for manifestly the Surrogate's Court has not jurisdiction to decide such issues, and they must be decided before there can be a final accounting by the administrator.

I, therefore, vote for affirmance.

McLAUGHLIN, J., concurred.

Orders reversed, with ten dollars costs and disbursements; motion to vacate temporary injunction denied, and motion for injunction *pendente lite* granted, with ten dollars costs.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Suing in Its Individual Capacity and as Administrator, etc.,
of ALEXANDER McDONALD, Deceased, Appellant, v. EDMUND
K. STALLO and Others, Respondents, Impleaded with THE
ALABAMA SECURITIES COMPANY and Others, Defendants.
(No. 2).

(*Supreme Court, Appellate Division, First Department, March 12, 1915.*)

EXECUTORS AND ADMINISTRATORS—SUIT BY ADMINISTRATOR, BOTH AS AN
INDIVIDUAL AND IN ITS REPRESENTATIVE CAPACITY, FOR AN ACCOUNTING
AND TO DETERMINE VALIDITY OF CLAIMS AGAINST ESTATE—DEMURRER—
MISJOINDER OF PARTIES PLAINTIFF AND OF CAUSES OF ACTION.

Complaint in a suit by an administrator, both individually and in its representative capacity, against all persons having any claim against the estate for an accounting, and incidentally to procure the adjustment of conflicting claims to securities and the proceeds thereof in the possession of the plaintiff, examined, and *held*, not to be demurrable, upon the ground of a misjoinder of parties plaintiff or of causes of action.

Although the complaint may contain material for more than one action, it is not demurrable, because they are not *improperly* united.

There was not an improper joinder of parties plaintiff or of causes of action on the ground that the plaintiff sued both in its individual and representative capacity. This, because, while technically the title to the assets of the estate was vested in the plaintiff as administrator, it was personally liable therefor, and, hence, was interested in both capacities in obtaining the judgment demanded.

LAUGHLIN and McLAUGHLIN, JJ., dissented, with opinion.

APPEAL by the plaintiff, Metropolitan Trust Company of the City of New York, individually and as administrator, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of October, 1914, sustaining demurrers to the complaint interposed by the respondents.

John G. Milburn of counsel (Walter F. Taylor with him on the brief), for the appellant.

Nash Rockwood of counsel (Rockwood & Haldane, attorneys), for the respondents.

SCOTT.—The demurrer of three of the defendants has been sustained on the grounds that there is a misjoinder of parties plaintiff, and also a misjoinder of causes of action. The plaintiff, the Metropolitan Trust Company of the City of New York, sues both as an individual and as the administrator of the goods, chattels and credits of Alexander McDonald, deceased. The condition of the estate of said McDonald, as disclosed by the complaint, is a very complicated one, and the professed purpose of the present action is to clear up and disentangle these complications, to determine the proper disposition of certain funds now in plaintiff's hands, to obtain an adjudication as to the sums for which it is justly chargeable, and to permit it to account therefor. The defendants embrace all persons who appear to have any claim to any portion of the estate. The following summary of the complaint (adopted from one of the briefs) fairly presents the questions upon which this appeal turns:

“Alexander McDonald died intestate in March, 1910, leaving as his only next of kin, his granddaughters, Laura McDonald Stallo and Helena McDonald Stallo Murat, both of whom were then minors. Their father and general guardian was Edmund K. Stallo. Stallo was appointed administrator of the McDonald estate in October, 1910. The plaintiff, Metropolitan Trust Company, upon Stallo's petition, was appointed co-administrator with him. In December, 1910, Stallo's letters were revoked, leaving the trust company sole administrator. Stallo, while acting as administrator, filed an inventory of which a copy is annexed to the complaint as Exhibit I, and after his removal filed a report which is annexed to the complaint as Exhibit II. Both in the inventory and report Stallo claims that there was a partnership between himself and McDonald, and classifies as partnership assets securities valued

by him at the sum of \$2,447,472.60, and classifies as partnership indebtedness debts amounting to \$2,685,719.28. Stallo, however, after the appointment of the plaintiff as administrator, did not in any way act as liquidator of the alleged partnership, or take any steps for the settlement of its affairs. The trust company did not know and has never been able to ascertain whether or not the partnership which Stallo claims to have existed, did in fact ever exist. It alleges, however, that for some years prior to McDonald's death, he and Stallo were engaged in joint undertakings having to do with the construction of the Mobile, Jackson and Kansas City Railroad and the Gulf & Chicago Railway Company (afterwards reorganized into the New Orleans, Mobile and Chicago Railroad), and that some at least of the indebtedness which Stallo classes as partnership indebtedness was incurred for the purposes of such undertakings, and that many of the securities which he classes as partnership property were acquired in connection therewith.

"Several years before McDonald's death the Metropolitan Trust Company began lending money on notes of which McDonald and Stallo, or one of them, were makers or indorsers, and to secure which stock, bonds, etc., of the Mobile, Jackson & Kansas City Railroad Company and of the Gulf & Chicago Railway Company were pledged. When McDonald died the Trust Company held a promissory note made by McDonald & Stallo (McDonald's name being signed by Stallo as attorney), dated December 8th, 1909, for \$2,700,000, payable twelve (12) months from date. As collateral security for this note there were pledged 2,000 shares of the capital stock of the Standard Oil Company (New Jersey) and bonds and stock of the New Orleans, Mobile & Chicago Railroad Company. The 2,000 shares of Standard Oil Company stock were the individual property of Alexander McDonald. The Metropolitan Trust Company never has known what the respective interests of McDonald and Stallo in the railroad stocks and bonds were.

In the summer and fall of 1911 the Trust Company, being then sole administrator of the McDonald estate, sold the Standard Oil stock and the railroad stocks and bonds. These sales produced enough to pay the amount due on the note held by the Trust Company and to leave a balance of \$434,250.93. This amount is in the hands of the Trust Company.

"The New Orleans, Mobile & Chicago Railroad Company which issued the railroad stocks and bonds pledged with the Trust Company as collateral for the \$2,700,000 note, was the result of a reorganization perfected about December, 1909, of the Mobile, Jackson and Kansas City Railroad Company and of the Gulf and Chicago Railway Company. According to the plan of reorganization the bonds of the new company were issued for bonds, notes and other indebtedness of the old companies, dollar for dollar. The holders of the stock of the old companies had to pay a 20 per cent. assessment on their stock and upon such payment became entitled to receive new common stock to the amount of the old stock held by them, bonds to the amount of the assessment and preferred stock to the amount of 20 per cent. of the assessment. At the time of the reorganization, 10,000 shares of the stock of the old companies were owned or claimed by General Brayton Ives. The assessment on this stock was \$200,000, and this assessment was paid by McDonald and Stallo out of the proceeds of the \$2,700,000 note, and on payment of this assessment there were issued in respect to the 10,000 shares of old stock 10,000 shares of common stock of the new company, 400 shares of its preferred stock and \$200,000 par value of its bonds. The stock of the new company so issued, never came into the possession of the Trust Company. The bonds and preferred stock were retained by Ives as his own property, but on or about February, 1912, he delivered said bonds and preferred stock and also \$20,000 (the amount of coupons collected by him on the bonds) to the attorneys of the Trust Company for and on its behalf as if de-

posited with it, as additional security for the loan made by it to McDonald and Stallo, and the loan having been paid, to be held by it for whomsoever might be entitled thereto, and in June, 1913, he sent a communication to the Trust Company stating that he had decided to relinquish any and all claims to said bonds, preferred stock and moneys. These bonds, shares of preferred stock and moneys are now in the hands of the Trust Company.

"In March, 1913, the defendant Edward V. Harmon, claiming to be a judgment creditor of the Alabama Securities Company, brought an action against the Alabama Securities Company, Metropolitan Trust Company, individually and as administrator, Edmund K. Stallo and others, and also other actions against the Trust Company as administrator. The defendant, Charles E. Levy, also brought an action against the same parties. The facts which formed the basis for these actions are as follows: In December, 1908, that is to say, about a year before the \$2,700,000 note was given, McDonald and Stallo and one William D. Stratton made and delivered to the Trust Company a promissory note for \$2,250,000 and pledged as collateral therefor various stocks, bonds, etc., of the two old companies. Part of this note had been paid and part of the collateral therefor had been surrendered before the \$2,700,000 note was given in December, 1909. The balance due was paid by McDonald and Stallo out of the proceeds of the latter note, and there was also paid out of said proceeds, the assessment payable under the plan of reorganization on the securities of the old roads, that had been held up to that time as collateral for the \$2,250,000 note. The securities of the new road issued pursuant to the plan of reorganization in respect to these securities of the old roads were the railroad securities which formed a part of the collateral for the \$2,700,000 note.

"Edward V. Harmon and Charles E. Levy, in the actions brought by them, claim that all or part of the securities of the

old roads pledged as security for the \$2,250,000 note were owned by the defendant The Alabama Securities Company, or that it had an interest therein, and that the Metropolitan Trust Company, individually, and also as administrator, Stallo, and others, are bound to account for such securities or for the proceeds thereof.

“McDonald, prior to December, 1909, had advanced very large amounts of money to the Alabama Securities Company, and that company had either transferred to McDonald and Stallo whatever rights it had in the securities of the old companies pledged as collateral for the \$2,250,000 note, or had fully authorized the action taken by Stallo and McDonald in reference to those securities. The Trust Company has never had any knowledge as to what, if any, was the actual interest of the Alabama Securities Company in the securities of the old companies, or what, if any, interest it had in the securities of the new company pledged to secure the \$2,700,000 note. The securities of the new company were all sold by the Trust Company before either the Harmon or the Levy actions were commenced, and any interest which the Alabama Securities Company may have had in such securities is confined to the balance of the proceeds of the sale by the Trust Company of the collateral for the \$2,700,000 note. This balance is the sum of \$434,250.93, referred to above, and is now held by the Trust Company subject to the determination of the question of the ownership thereof and the interests therein.

“Claims have been filed against the estate of Alexander McDonald on various notes secured by collateral claimed by Stallo to be partnership assets or claimed by him to be his individual property, but some of which *prima facie* are the property of the Alabama Securities Company. The Trust Company as administrator has had to pay a number of such claims, and has in its possession a large amount of securities which were held as collateral by the claimants, and it does not now and never has

been able to ascertain what the respective interests of the McDonald estate, Edmund K. Stallo and the Alabama Securities Company are therein. It has also received and now holds other securities which are claimed by Stallo as his own property or to be partnership assets. A great number of claims have been filed against the estate, based on obligations for which Stallo was either primarily liable or jointly liable with McDonald. Some of these claims are still pending, some, as above stated, have been paid, and the collateral therefor has been received by the Trust Company. The Trust Company, as administrator, has some interest in these securities, but has never been able to ascertain the extent of such interest.

"The complaint, after setting forth the facts above summarized, proceeds:

"37. 'Without an accounting to be had herein with respect to the matters hereinabove set forth; and a determination with respect to the assets that have come into the possession of the plaintiff; and an ascertainment as to which of said assets are the property of the estate of Alexander McDonald, and which thereof are the property of said estate jointly with others, and the interest therein of said estate, and what if any interest the defendant Stallo or the defendant Alabama Securities Company has therein, or in any thereof; and a marshalling of the individual and joint liabilities of said McDonald and Stallo and of their individual and joint assets; and a determination of the conflicting claims in respect to the bonds and preferred stock of the New Orleans, Mobile & Chicago Railroad Company and the interest heretofore collected on the same now held by the plaintiff's attorneys for and on its behalf as alleged in the foregoing Paragraph 27 hereof; and a determination as to the amount of the assets of the estate of Alexander McDonald; the plaintiff is unable to determine what portion of the moneys, assets and other property in its hands belongs to the estate of Alexander McDonald and what portion belongs to others,

if any, or to render an account to the Surrogate's Court as such administrator of its acts, transactions, receipts and disbursements to the end that it may be settled and allowed, or to have the amount of the transfer tax upon said estate determined and paid, or to pay over and deliver to others any portion of said moneys, property and other assets to which they may be entitled.'

"38. 'By reason of the premises and of the matters and things hereinbefore set forth, the Surrogate's Court of the county of New York is without the power and jurisdiction to determine the matters involved in this action, and to do full and complete justice between the parties hereto.'

"The Trust Company demands judgment (1) that it be ascertained and determined what the interests of the estate of Alexander McDonald and of the defendant Edmund K. Stallo and of the Alabama Securities Company respectively are in the net proceeds of the collateral for the \$2,700,000 note, and in the stocks, bonds and securities which have come into the Trust Company's possession; (2) that Edmund K. Stallo be required to account in respect to all of the transactions in which he and McDonald participated; (3) that with respect to the \$200,000 of bonds (including the interest thereon), and the preferred stock above referred to, the interests therein of the estate of Alexander McDonald, and of Stallo and of the Alabama Securities Company, be ascertained and determined, and also their respective liabilities on account thereof; (4) that it be adjudged and determined that the collateral pledged with the Trust Company to secure the \$2,250,000 note and the \$2,700,000 note was so pledged with the consent of the Alabama Securities Company; (5) that it be adjudged and determined that plaintiff may account herein for its acts, proceedings, receipts and disbursements as administrator of the estate of Alexander McDonald to the end that it may be ascertained and determined for what amount and for what property and assets plaintiff is

chargeable as such administrator and its account settled and allowed; (6) that it be adjudged and determined what disposition shall be made of the property and assets found in its hands and that plaintiff be discharged from liability to the parties or any of them on account of the transactions set forth; (7) that each of the defendants be enjoined from maintaining suits against the plaintiff either in its individual capacity or as administrator concerning any of the matters and things set forth in the complaint."

While it may be that it would be possible to find in this complaint the material for more than one action, this is by no means uncommon in actions in equity, nor is it a ground of demurrer. It is only when causes of action are improperly united that a complaint is obnoxious to demurrer. (Code Civ. Proc. § 488, subd. 7.) Primarily and mainly this is an action for an accounting to determine, under very complicated conditions and in the face of very numerous conflicting claims, with just what the plaintiff is chargeable to the estate of McDonald. Incidentally it is sought to procure the adjustment of some of the conflicting claims to which we have referred, and indeed such an adjustment is a necessary incident and prerequisite to the determination of the primary question sought to be determined. Until all these incidental questions are answered and the claims of persons not directly interested in the estate to the moneys and securities apparently constituting a part of the estate are adjusted and determined, it will be impossible for plaintiff or any one else to know precisely of what the estate consists. Similar complaints have frequently been upheld. It has been considered that they fall within subdivision 9 of section 484 of the Code of Civil Procedure, which permits the uniting in one complaint of two or more causes of action "upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section." It

is true that this provision is qualified by the further provision in the same section that the causes of action so united must be consistent with each other, and, except as otherwise prescribed by law, that they affect all the parties to the action. The separate causes of action, if there be such, which the respondents insist are to be found in the complaint are certainly not inconsistent, and it is also certain that the primary and predominant cause of action stated by the complaint, as well as the judgment sought, will affect all of the defendants in one way or another. It is not essential in equity that they shall all be affected alike. (*People v. Equitable Life Assurance Society*, 124 App. Div. 727.) The main object of the action, as has been said, is to ascertain and have judicially determined just what constitutes the assets of the estate for which plaintiff is accountable. Clearly the next of kin are vitally interested in this question and are proper and even necessary parties. Equally clearly the other defendants are also interested, for they all claim some right or interest in the apparent assets. "The fact that their pecuniary interest may not be the same, or that some may not be interested in the incidental relief obtained by others does not prevent all being interested in the subject of the action and in obtaining the judgment demanded." (*Mullin v. Mullin*, 119 App. Div. 521; *Simar v. Canaday*, 53 N. Y. 298; *Shepard v. Manhattan R. Co.*, 117 id. 442.) "It is proper in a suit in equity for an accounting to bring in all the parties to be affected thereby and to set forth such facts germane to the accounting as will give to the plaintiff in such an action adequate and complete relief; and a complaint which includes such parties and transactions is not open to demurrer upon the ground of improper joinder of parties or of causes of action." (*Donnelly v. Lambert*, 62 App. Div. 189.)

Nor do we find any improper joinder of parties plaintiff or of causes of action arising out of the fact that the plaintiff sues both in its individual capacity and as administrator of the

McDonald estate. Such a joinder has been frequently upheld. (*Donnelly v. Lambert*, *supra*; *Shuttleworth v. Winter*, 55 N. Y. 624; *Bushe v. Wright*, 118 App. Div. 320.) A sufficient reason for such a joinder is that while technically the title to the assets of the estate are vested in plaintiff as administrator, the liability for such assets and the responsibility for the acts of the administrator will fall upon the plaintiff individually, for as we said in *Newcombe v. Lottimer* (35 N. Y. St. Repr. 614; *affd.*, 128 N. Y. 618): "It is well settled that the acts of executors in respect to the estate of which they are the trustees, which acts may be proper in themselves, may result in an individual liability of such executors, and that in the course of the administration of an estate the acts done by the executor are his individual acts for which he is individually responsible, although the acts done may relate to the business of the estate." It is of course evident, and, as we understand, not disputed, that if this action had been begun by plaintiff solely in its representative capacity, it would have been a proper party defendant in its individual capacity. Is it necessary to transplant the plaintiff individually from its position as plaintiff to a position with the defendants? The Code of Civil Procedure does not require that the parties joined as plaintiffs shall have a common or identical interest in the cause of action. The requirement is that "all persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act." (§ 446.) It is quite obvious that in an action for an accounting in which the object is to ascertain and fix the amount for which the executor or administrator is liable, he has an interest in the subject of the action both individually and in his personal capacity, and in both capacities he is interested in obtaining the judgment demanded. For this reason it is quite common for an executor or administrator to sue in both capacities. Such a joinder puts any defendant who wishes

to assert a claim against the administrator in either capacity at no disadvantage.

For these reasons, we are of the opinion that the demurrer should have been overruled.

The order appealed from will, therefore, be reversed, with ten dollars costs and disbursements, and plaintiff's motion to overrule the demurrer and for judgment upon the pleadings granted, with ten dollars costs, with leave to defendants to withdraw their demurrer and answer over upon the payment of said costs within twenty days.

INGRAHAM, P. J., and CLARKE, J., concurred; McLAUGHLIN and LAUGHLIN, JJ., dissented.

LAUGHLIN, J. (dissenting).—The respondent Edmund K. Stallo, who, according to the allegations of the complaint, claims an interest in moneys and securities in the hands of the Metropolitan Trust Company, and was engaged in various joint enterprises or copartnership undertakings with the decedent concerning which there has been no accounting and with respect to which an accounting is demanded in this action, and the respondents Laura McDonald Stallo and Helena McDonald Stallo, who are the sole next of kin of Alexander McDonald, deceased, jointly demurred to the complaint on the grounds that there is a misjoinder of parties plaintiff and that causes of action have been improperly united, and on the further ground that the complaint fails to state facts sufficient to constitute a cause of action, either in favor of the trust company in its individual or in its representative capacity. There was no decision at Special Term on the demurrer on the grounds of insufficiency of the allegations of the complaint, and, therefore, the questions presented by the grounds of demurrer relating thereto are not presented for review.

I am unable to agree with the views expressed in the majority

opinion with respect to either of the two grounds of demurrer therein considered. It appears by the allegations of the complaint that at the time the plaintiff was appointed administrator it owned and was in possession of a promissory note made by the respondent Edmund K. Stallo and by the decedent by said Stallo as his attorney in fact, dated December 8, 1909, payable on December 8, 1910, for \$2,700,000, and held as security therefor \$2,138,000 first mortgage bonds of the New Orleans, Mobile and Chicago Railroad Company; \$240,900 preferred stock of said company; \$1,950,000 common stock of said company; \$155.26 bond scrip of said company; \$116.10 preferred stock scrip of said company; \$68 common stock scrip of said company, and \$200,000 par value of the capital stock of the Standard Oil Company of New Jersey; and that after its appointment as administrator and while it was the holder and owner of said note, commencing with the summer of 1911, it sold from time to time all of said securities, and that it applied the proceeds of such sales to the payment of said note, and holds a surplus of \$454,250.93 in its individual capacity. It is also alleged that on or about the 2d of February, 1912, defendant Brayton Ives delivered to the attorneys for the trust company \$200,000 par value of bonds and 400 shares of preferred stock of the New Orleans, Mobile and Chicago Railroad Company and \$20,000 in cash, which he claimed to own, for and on behalf of the trust company "as if deposited with it as additional security" for said note, and the note at that time having been paid, "to be held by it for whomsoever might be entitled thereto." It is further alleged, in substance, that in selling said securities the trust company acted within its rights as pledgee thereof and received the best price obtainable therefor, and judgment to that effect is demanded. The complaint does not disclose the existence of any controversy between the plaintiff as such pledgee and as administrator with respect to these matters, but proceeds upon the theory

that the plaintiff in its capacity as administrator approves of all its acts as such pledgee. It is also alleged, however, that the defendants Harmon and Levy claim an interest in the right of defendant securities company in the securities so held by the plaintiff as pledgee; that the plaintiff as administrator, defendant Edmund K. Stallo and defendant securities company make claims to said surplus remaining on said sale of the securities so held by plaintiff as pledgee after the payment of said note; that plaintiff as administrator, said Stallo and defendant Ives each claim the securities and cash delivered by said Ives to the attorneys for the trust company as stated; that the plaintiff is unable to determine the merits of these conflicting claims without jeopardy to its own interests; and judgment is further demanded determining the respective claims and interests of said claimants, if any, in and to said funds and securities.

It may be conceded for the purposes of deciding this appeal that the trust company as pledgee sufficiently shows a cause of action for the relief demanded to the extent stated. It is manifest, however, that there is here stated no cause of action in favor of the trust company as administrator; but on the contrary a cause of action in favor of the trust company as pledgee against the administrator and others.

The complaint further shows certain joint ventures or co-partnership undertakings on the part of the decedent and Edmund K. Stallo, with respect to which there has been no accounting, and judgment for such an accounting is further demanded; and it is further alleged that certain bonds, stocks and other securities, which were pledged as collateral security for notes which the administrator has paid, have come into the hands of the administrator, and are now held by it, and that it has received and now holds other stocks and securities; that Edmund K. Stallo asserts a claim individually to some of these securities, and asserts that others of them belong to the co-partnership between him and the decedent; and that some of

them were pledged as security for notes of which the defendant securities company and others were either makers or indorsers with the decedent and said Stallo, and the plaintiff does not know what interest, if any, Stallo, or the copartnership, have in these securities, or whether the defendant securities company has any interest therein, but it is not alleged that the securities company has asserted any claim thereto. Judgment is likewise demanded determining the rights and interests of said Stallo individually and of the copartnership and of the securities company with respect to these matters.

It is likewise manifest that the facts alleged with respect to these matters do not show a cause of action in favor of the trust company or one in which it is interested in its individual capacity but rather two, one for the copartnership accounting and another to determine conflicting claims to the stocks and securities, both in its favor as administrator, in which it individually has no interest. It, therefore, seems to me quite clear that there is both a misjoinder of parties plaintiff (see *Doyle v. Carney*, 190 N. Y. 386; *Case v. N. Y. Mut. Sav. & Loan Assn.*, 88 App. Div. 538; *Hart v. Goadby*, 138 id. 160; *Groh v. Flammer*, 89 id. 28; *Lawrence v. McKelvey*, 80 id. 514; *Havana City R. Co. v. Ceballos*, 49 id. 263. See, also, *Arkenburgh v. Wiggins*, 13 App. Div. 96; *affd.*, 162 N. Y. 596; *Hubbell v. Lerch*, 58 id. 237), and a misjoinder of causes of action. (See *Case v. N. Y. Mut. Sav. & Loan Assn.*, *supra*; *Hart v. Goadby*, *supra*; *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316; *O'Connor v. Virginia Passenger & Power Co.*, 184 id. 46; *Cass v. Realty Securities Co.*, 148 App. Div. 96; *affd.*, 206 N. Y. 649.) If McDonald were living, plainly he could not have joined these causes of action, and, therefore, the cases of *Shepard v. Manhattan R. Co.* (117 N. Y. 442) and *Mullin v. Mullin* (119 App. Div. 521) and kindred authorities do not sustain the complaint.

As I view the case, there is no conceivable theory upon

which these causes of action might properly be united in a single complaint. If it be assumed that the action is brought by the plaintiff as administrator primarily to determine the rights and interests of the estate of the decedent in the funds and securities in the hands of the plaintiff as pledgee and as administrator, and for an accounting with respect to the joint ventures, or copartnership enterprises, the same difficulty is encountered, for neither the trust company nor the defendants who assert an interest in the funds and securities in its hands individually and as administrator, have any interest in the settlement of the transactions between the decedent and Edmund K. Stallo, as joint venturers or copartners. Nor can the action be maintained on the theory that it is brought by the plaintiff as administrator for a final accounting and distribution of the assets in its hands as such. The complaint contains no appropriate allegations to warrant the Supreme Court in taking jurisdiction and in ousting the Surrogate's Court of jurisdiction, for it is not alleged that all the debts and obligations of the estate have been paid or that there is no one interested in the estate other than the defendants (see *Hart v. Goadby*, *supra*; *Bushe v. Wright*, 118 App. Div. 368; *affd.*, 195 N. Y. 510; S. C., 118 App. Div. 320; *aff'd.*, 195 N. Y. 509), and while the Supreme Court has jurisdiction concurrently with that of the Surrogate's Court to require an accounting by executors or administrators, its jurisdiction is only exercised to the extent necessary to supplement the jurisdiction of the Surrogate's Court with respect to matters concerning which the latter court is without jurisdiction. (*Chipman v. Montgomery*, 63 N. Y. 221; *Borrowe v. Corbin*, 31 App. Div. 172; *affd.*, 165 N. Y. 634.) But it is not even claimed that the action is one for a final accounting of the administrator. There is no precedent, and I see no propriety in establishing one, for a partial or intermediate accounting in the Supreme Court *between the administrator and the next of kin*, and, therefore, the action cannot be

maintained for that purpose, and the joinder of these separate causes of action sustained on the theory that they are incidental to such an accounting. Although the Surrogate's Court has full jurisdiction to take or to require an accounting by the administrator, it has not jurisdiction of the causes of action set forth in the complaint with respect to the determination of conflicting claims to said funds and securities and to require the surviving partner or joint adventurer to account to the estate of the decedent. It is, therefore, both proper and necessary that those causes of action be litigated in a court of competent jurisdiction. They cannot, however, be deemed merely incidental to this action on the theory that it is one for either *a final or a partial accounting* by the administrator. The administrator is not ready to account with respect to the decedent's interest in the copartnership or joint adventures or with respect to the funds and securities held by plaintiff as pledgee, or by it as administrator, and it is the duty of the administrator to collect the assets of the estate by enforcing its rights or having them determined without joining the next of kin and creditors and calling upon or leaving it to them in their respective individual rights to endeavor indirectly to enforce or to protect the rights of the estate. If this action should be sustained on the theory that it is one for *an accounting by the administrator*, and that all other relief demanded is incidental thereto, and that it is properly brought in the Supreme Court owing to want of jurisdiction in the Surrogate's Court to decide the *incidental* matters, there would be no limit to the number of independent and wholly disconnected equitable causes of action that might be thus joined as *incidental* to an accounting by an executor or administrator in the Supreme Court where it becomes necessary to resort thereto before there can be a final accounting; and the action might be brought at once upon the issuance of letters of administration and without first enforcing or endeavoring to enforce the equitable causes of action in favor of

the estate, and by making the creditors and, as has been done here, the next of kin parties, shift or endeavor to shift the burden, which devolves upon the executors or administrators, of proving the causes of action on to the creditors and next of kin at the risk of being concluded by an adverse decision in an action to which they are parties. If executors and administrators could thus avoid all the responsibility and risk of liability on the settlements of their accounts, such actions would become common and a very large part of the work designed to be performed by the Surrogates' Courts would devolve on the Supreme Court and the expenses and delays in the administration of estates would be largely increased. There is no precedent for such an action and none should be established.

McLAUGHLIN, J., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to defendants respondents to withdraw demurrer and to answer on payment of costs.

JULIA MORRIS CURTIS LAWRENCE, Respondent, v. CHARLES E. LITTLEFIELD, as Administrator with the Will Annexed, etc., of MARY G. PINKNEY, Deceased, and Others, Defendants, Impleaded with LOUIS H. MORRIS and Others, Appellants.

(*Supreme Court, Appellate Division, First Department, March 12, 1915.*)

WILL—DEVISE OF LANDS IN TRUST, WITH DISCRETIONARY POWER OF SALE IN EXECUTORS—TRUST FOR LIVES, WITH REMAINDERS OVER—WHEN LIFE BENEFICIARIES CANNOT COMPEL SALE OF LANDS WHICH DO NOT PRODUCE INCOME—SALE TO PAY CARRYING EXPENSES OF LANDS—PRIOR DECREE THAT RESIDUARY CLAUSE WORKS CONVERSION—EFFECT OF SUCH DECREE.

Where a testatrix conveyed unimproved and unproductive real estate

to her executors in trust, to pay the income therefrom to certain beneficiaries for life, with remainders over, and further gave to her executors (not to the executors as trustees) a discretionary power to sell for the purpose of paying taxes and assessments and to dispose of the surplus pursuant to the trust, it was the intention of the testatrix that the power of sale should be executed by the executors as such, and not by the executors as trustees, the time, terms and circumstances of the execution of the power being wholly discretionary. Hence, the only right of the trustees was to receive for the life beneficiaries' account such surplus as might remain after the taxes and assessments have been paid, and they cannot be compelled to set apart moneys representing principal from which the life beneficiaries may draw an income, where the lands have suffered a continuous depreciation in value and the cost of carrying the same has exceeded the income therefrom.

Such power of sale is not mandatory, but is to be exercised only by the executors when necessary to pay taxes and assessments, and hence they are not required to sell the lands in order to obtain a surplus from which the life beneficiaries may draw an income.

Where it was decreed in a prior action that the effect of the residuary clause, which covered both real and personal property, was to blend the same and to work an equitable conversion of the real estate into personality, that judgment becomes the law of the case. But, giving it the fullest effect, it does not determine that the power of sale was mandatory, or that the executors were not vested with discretion both as to time and terms of sale.

APPEAL by the defendant, Louis H. Morris, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of May, 1914, overruling his demurrer to the amended complaint.

Appeal by the defendants, Keith W. Morris and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of June, 1914, overruling their demurrer to the amended complaint.

The complaint set forth the following facts: Mary G. Pinkney died in December, 1908, leaving an estate consisting of personalty valued at about \$700,000, and real estate valued at that time at about \$8,000,000, nearly all of which was unim-

proved and unproductive, and has since suffered a continuous depreciation in value. By the 8th clause of her will, after making certain bequests of inconsiderable value, all of which have been paid, and certain devises of specific pieces of real property, she divided the residue of her real and personal estate into four parts, of which she gave absolutely to each of her nephews Thomas and Archibald one part. To her niece Grace she gave one-half of one part absolutely, and the remaining half to her executors in trust to pay the income thereof to Grace for life, with remainder over to the children of Grace. One part she gave to her executors in trust to invest and pay the income to the plaintiff (also a niece) for life, with remainder over to her children. By the 9th clause, in the event of the death of either of her nephews or nieces before the testatrix, leaving issue, the share of the one so dying was devised to such issue, but in default of any such issue, the share of the deceased nephew or niece was to be divided equally among his or her surviving brothers and sisters, "the whole of such part or share as may then fall to" the plaintiff and one-half of that "then" falling to Grace to be held by the executors upon trusts as aforesaid, and the other half of Grace's share to be taken and enjoyed by her absolutely.

The 10th clause was as follows: "I give unto my executors * * * power and authority to sell, either at public or private sale, all my real estate or any part thereof upon such terms as in their judgment they shall deem proper, and to execute proper conveyances thereof, and that they apply such portions of the proceeds as in their judgment they may deem proper to the payment of any taxes and assessments that may be liens upon said real estate or any part thereof, and to pay over the surplus that may not be required in their judgment for the above named purpose to the said" nephews and nieces "in the proportions [hereinbefore] mentioned," the whole of such part or share as may "*then*" fall to the plaintiff, "to be held

in trust by my executors as hereinbefore provided ;" one-half of the share that may "*then*" fall to Grace to be similarly held in trust, and the other half to her absolutely.

Prior to the commencement of this action portions of the real estate were sold for approximately \$2,660,000. The gross income from all the real estate to May 1, 1912, amounted to only about \$101,000, whereas the "carrying charges" alone amounted to over \$315,000. The surviving executor at various times between January and June, 1912, transferred to himself as plaintiff's trustee an aggregate of \$775,000, no part of which was derived from income of the estate, and not until January, 1913, did plaintiff receive from the estate devised to her any income whatsoever. In November, 1912, after the death of the surviving executor, the defendants Lincoln Trust Company and Fischer were substituted as trustees of the trust created for plaintiff and her remaindermen. Prior to the commencement of this action the executors brought an action for the construction of the will, to which action this plaintiff was a party. By the judgment in that action it was determined that, for the purposes of the residuary clause, the effect of the will was to blend the real and personal property and to work an equitable conversion of the real estate into personalty. For relief in the present action, plaintiff prayed that the trustees be decreed to set apart from the moneys theretofore received by them, and as well from any moneys they might thereafter receive from the administrator *cum testamento annexo* representing proceeds of real estate thereafter sold, a sum or sums to be ascertained by computation and which shall be taken to represent the principal of the devise for plaintiff's use, which sums, with interest from the date of the death of the testatrix to the time when the several sums were or should be actually received, shall equal the sums so received, and that the difference or surplus be paid to plaintiff as and for income.

Henry A. Forster, for the appellant Louis H. Morris.

Abram I. Elkus, for the appellants Keith W. Morris and another.

Frederick H. Sanborn, for the respondent.

HORCHKISS, J.—What, if any, relief plaintiff is entitled to depends upon the intent of the testatrix, to be gathered from the will itself. It must have been apparent to the testatrix that the real estate constituting the major portion of her estate could afford the plaintiff no income except from proceeds of sales. The devise of the share in which plaintiff is interested is direct to trustees, who were in fact identical with the individuals named as executors, although this identity was a coincidence of person merely and not of estate. But inasmuch as an express power of sale was given to the executors as such, and not to them as trustees, I think it was evidently the intention of the testatrix that this power should be executed by the executors as such, although the time, terms and circumstances of its execution were left wholly discretionary, as there are neither mandatory nor directory words in the clause creating the power. Viewed in this light, the only right of the trustees was to receive for plaintiff's account such "surplus" as might remain after taxes and assessments had been paid. If the power to sell were to be construed to be an imperative power to be executed at once as to all the real estate, there would be no force in the words which authorized the executors to "apply such portions of the proceeds as in their judgment they may deem proper to the payment of any taxes and assessments that may be liens upon said real estate or any part thereof, and to pay over the surplus that may not be required in their judgment for the above" purposes, because the sale of any real estate on which liens for taxes or assessments existed would necessarily require the pay-

ment of such liens from the purchase money. It is manifest also that the discretion with which the executors were vested permitted them to sell from time to time so much only as might at the utmost be necessary to pay the taxes and assessments on the whole, thus leaving no "surplus" for distribution. What the testatrix evidently intended was that the real estate devised to the trustees should be held by them as such, and that as executors they should from time to time as to them seemed best, sell portions, and after paying the taxes and assessments on the whole or on such parts as they deemed proper, they should pay over to themselves as trustees any remaining "surplus," the same to be held under the terms of the will. Until such sales were made, taxes paid, and "surplus," if any, paid over, there necessarily could be no income for plaintiff to enjoy. Nor can I see that any different result would be reached should we construe the power of sale to be mandatory and immediate, for in that event as well, all the trustees would have been entitled to receive was the "surplus" to which I have alluded, and until such "surplus" was obtained by the execution of the power there could be no income to which plaintiff would be entitled. If it be urged that the interpretation I put upon the will leaves the plaintiff at the mercy of the discretion of the executors and sacrifices her for the benefit of the remaindermen, I think a sufficient answer lies in the fact that in the event of any improper delay, the plaintiff might have appealed to the court to direct the executor to execute the power. Although I do not think it necessary to resort to rules of construction to ascertain the intent of the testator in this instance, should we revoke such rules, they do not in my opinion aid this plaintiff. We may accept it as settled law in this State that where the income or interest of a particular fund is bequeathed to one for life (*Matter of Stanfield*, 135 N. Y. 292), or where there is a clear bequest of a life estate in a residuary fund or some part thereof (*Matter of Benson*, 96 N. Y. 499, 511), if the will evidences

no different intent, the legatee for life is entitled to interest or to the income as afterwards ascertained, to be computed from the death of the testator. Necessarily the rule is not one of property, but one of construction, and its reason lies in the injustice of increasing the principal for the benefit of the remaindermen, who would thus be given just so much more than existed at the time of the testator's death, and this at the expense of the life estate. (Davison v. Rake, 44 N. J. Eq. 506.) The cases in which this rule has been successfully invoked are very numerous. In some States, as in Massachusetts, the matter seems to be the subject of a statute. (See Ayer v. Ayer, 128 Mass. 575.) But all the cases I have found are, I think, distinguishable from the present, and none of binding authority involved unproductive real estate. The cases may be roughly classified as involving productive real estate; gifts of productive personalty or of personalty easily susceptible of being made productive; of an annuity or income; gifts to widows or in lieu of dower, or to infants, children of the testator, or such as toward whom he stood *in loco parentis*; where part of the estate consisted of wasting property, such as leaseholds, or where mortgages or other investments of the trustees have been foreclosed or taken in and a question arose as to the apportionment of the proceeds which included a profit or something on account of income. That the principle is not a rule of thumb to be indiscriminately applied, and that even in the case of personalty it has regard for a situation where no income has in fact been earned, or might reasonably be expected to be earned, is clearly shown by the authorities and also appears in that portion of the opinion of the chancellor in Williamson v. Williamson, where the distinction is pointed out between those instances where a life estate is constituted in a clear residuary fund and where "the testator had directed one species of property to be converted into another, or the residuary fund to be invested in a particular manner, and had then given a life estate in the fund

as thus converted or invested." In the former class, having regard for actual income conditions *in esse* or *in posse*, the income awarded to the life estate is computed from the time of the death of the testator, whereas, because of the delay in securing income necessarily incident to the latter class, the computation is not made until "the conversion takes place or the investment is made," for which purpose one year from the date of the testator's death has been adopted as a convenient period from which the computation of income shall date. (6 Paige, 304, 305.) In *Edwards v. Edwards* (183 Mass. 581), which is so greatly relied on by the respondent, there was a gift of all testator's property direct to trustees to pay the income, less certain specified sums, to testator's wife for life. The estate consisted of unimproved real estate and personal property. The former, after a delay of some years, was sold at a large advance over its inventoried value, and the question before the court related solely to an apportionment of the proceeds between the widow and the remaindermen. A mere statement of the facts should be sufficient to show the material respects in which that case is different from the present.

The precise situation we have here is one which, so far as I can find, has never been presented in any reported case in this State. It is one of a gift of personalty and unproductive real estate combined, to trustees, with an absolute power in the executors to convert, accompanied by a discretion as to the time when such conversion is to take place, and where there has been no profit and the conversion has been justifiably delayed. In every case I have been able to find involving the interpretation of a testamentary devise of this character, where the court has applied the rule adopted by the court below, there had been an increase in value, or the court was dealing with a species of property which lent itself to the presumption that the testator intended that the life tenant should participate in the enjoyment of the income which the subject of the devise produced

or was capable of producing. If the rule invoked were applicable here, I take it that the fact that the express power to convert is given to the executors as such, and not to them as trustees, would not necessarily defeat its application, and inasmuch as the complaint is silent concerning any income from the personal property and asks for no relief in that regard, the fact that the estate is one of mixed real and personal property might also be disregarded, and the case treated as a trust to convert unproductive real estate at the discretion of the trustees. In *Rodman v. Fincke* (68 N. Y. 239) unproductive real estate was involved. Referring to the principle applicable to gifts in trust to convert with a life estate and remainder over, *RAPALLO, J.*, spoke of it as one which "has been adopted," implying, I presume, that it was applicable to the character of property there involved, but as, on its facts, the case was not one between life tenant and remaindermen, the learned judge said the principle was not applicable. As authority for the rule as he stated it, Judge *RAPALLO* (p. 244) cited *Yates v. Yates* (28 Beav. [1860] 637, 639) and *Livingston (sic) v. Gray* (2 Sim. & Stu. [1825] 396). *Kilvington v. Gray* involved personal property in certain of which the testator created trusts, and also directed that his personalty be converted into land as soon as convenient, and in the meantime the uninvested estate was to be invested in public stocks to be held upon certain trusts. It proving impossible to make the conversion, the court held that the life tenant was entitled to the income after one year from the testator's death. I cannot regard *Kilvington v. Gray* as a case in point. In *Searle v. Baker* (L. R. [1900] 2 Ch. Div. 829, 832) *KEKEWICH, J.*, refused to follow *Yates v. Yates*, saying that it was at variance with the later cases. *Searle v. Baker* was followed by *WARRINGTON, J.*, in *Wilson v. Oliver* (L. R. [1908] 2 Ch. Div. 74, 80). In *Searle v. Baker* the residuary estate, consisting of both real and personal property, was given to trustees for sale and conversion, the proceeds to be held in

trust to pay the income to the testator's wife for life, with express power to postpone conversion so long during the wife's life as the trustees saw fit. The real estate was productive, but no conversion having been made, the widow was held entitled to the rents and profits. In the course of his opinion, after referring to passages which he had already quoted in a former case from Jarman and Lewin, Judge KEKEWICH said (p. 834): "I thought at first that there was a little ambiguity in Lewin's statement (10th ed., p. 1161): 'If a testator direct his real estate to be sold, and the proceeds laid out and invested in trust for A. for life with remainders over, the tenant for life is entitled to the rents only of the estate from the testator's decease.' But now that I have threshed the matter out, I think that there is a good deal of truth in it; for in the case of real estate, if the estate produces nothing, the tenant for life can get nothing, whereas in the case of personalty he would get something upon the principle laid down In re Earle of Chesterfield's Trusts" (L. R. [1883] 24 Ch. Div. 643), a case similar in general principle to *Williamson v. Williamson* (*supra*).

There is one feature of the complaint to which I have not yet alluded. I refer to the judgment in the action to construe the will. (*Pierce v. Thomas*, not reported.) Whatever doubt may exist as to the soundness of the decision involved in that judgment, it must be accepted as the law of the case. Giving to this judgment the fullest effect to which it is entitled, it is not alleged in the complaint herein, nor could it properly be held, conceding the trust to sell was mandatory, that the executors were not vested with a discretion both as to the time and the terms of sale. The opinion of Mr. Justice BISCHOFF in *Pierce v. Thomas* clearly shows such to have been his view. The fact that this judgment determined that an equitable conversion was worked by the terms of the will does not affect the question of the plaintiff's right to the relief she seeks. The doctrine of equitable conversion has properly been characterized

as both artificial and arbitrary, and granting to it the fullest effect so far as devolution, succession and other matters affecting title are concerned, I cannot see how it can be applied so as, by presumption of law, to produce income from an estate where no income has in fact been earned, or the right to income, save as it might arise from an application of the doctrine. (See *Hite v. Hite*, 20 S. W. Rep. 778.)

The orders should be reversed, with ten dollars costs and disbursements, and the demurrers sustained, with ten dollars costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and SCOTT, JJ., concurred.

Orders reversed, with ten dollars costs and disbursements, and demurrers sustained, with ten dollars costs.

In the Matter of the Estate of GEORGE L. FOX, Deceased.
BESSIE L. RUBENS, Surviving Executrix and Trustee, etc.,
Appellant; GLADYS M. L. AINSLIE, Respondent.

(*Supreme Court, Appellate Division, Second Department, March 19, 1915.*)

SURROGATE'S COURT—JURISDICTION OF SURROGATE TO DETERMINE ISSUES RAISED ON PETITION FOR ACCOUNTING—CONTENTION THAT WAIVER OF ACCOUNTING AND RELEASE WAS OBTAINED BY SURROGATE—PRACTICE—SEPARATE TRIAL OF ISSUES RAISED IN SURROGATE'S COURT—JURY TRIAL NOT CONSTITUTIONAL RIGHT—INJUNCTION RESTRAINING TRANSFER OF TRUST ESTATE.

Where one of the beneficiaries of a testamentary trust who is also a remainderman petitions the Surrogate's Court for an accounting of the trust estate, and the trustee by answer alleges that after the trust had terminated all parties agreed to a distribution of the estate pursuant to the will and that on said distribution they waived the filing of an account and released the executrix and trustee from liability, and the petitioner by reply sets out that the waiver and release were obtained by fraud and false representations in that she was not truly advised as

to the condition of the estate or the amount thereof, etc., and that she had not received her portion, the issues raised by said answer and reply are triable in the Surrogate's Court pursuant to section 2510 of the Code of Civil Procedure.

Having such jurisdiction it is the duty of the Surrogate's Court to try and determine said issues in the first instance, for the petitioner is entitled to an accounting only as to that portion of the estate still held in trust.

While there is no statute expressly providing for the separate trial of issues in the Surrogate's Court, the Code of Civil Procedure, section 973, providing that the court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case, is sufficient to authorize such practice in the Surrogate's Court.

It is error for the surrogate to order the testamentary trustee to account without having first taken evidence and decided the issues aforesaid.

There is no "constitutional right of trial by jury" of the issues raised in the Surrogate's Court by the answer and reply aforesaid.

A failure of said testamentary trustee to appeal from an order of the surrogate enjoining her from selling the trust property, with certain exceptions, would not be taken as a concession as to the right of the petitioner to an order for an accounting. Hence, where that is the only objection to the injunction it will be affirmed.

APPEAL by Bessie L. Rubens, as surviving executrix and trustee, from two orders of the Surrogate's Court of the county of Putnam, entered in the office of the said Surrogate's Court on or about the 31st day of December, 1914. The first order restrained the appellant from disposing of property belonging to the estate of George L. Fox, deceased, and the other directed her to render and file an account of her proceedings herein.

Harry R. Kohn, for the appellant.

George C. Beach' (Sylvanus D. Ward with him on the brief), for the respondent.

BURR, J.—George L. Fox died February 17, 1904, leaving him surviving a widow, a son and a daughter. He left a last will and testament, thereafter duly proved in the Surrogate's

Court of the county of Putnam. He appointed his widow and Edward Wells, Jr., executors. By his will, all of the residue of his estate was given to his executors, in trust, for a term measured by the life of his son, George L. Fox, Jr., or his arrival at the age of twenty-one years. During this term, one-half of the income of the trust estate decedent directed to be paid to his widow; one-quarter, or so much thereof as might be necessary, he directed to be paid out for the support, maintenance and education of his son, and the remainder for the support, maintenance and education of his daughter, the petitioner herein. The will further provided that when his son should reach the age of twenty-one years the trust should terminate, and that his estate should be divided into three parts, one of which should be paid to his said son, another to his said daughter, and the third invested for the benefit of his wife during her life, with remainder over to his said children if they were then living. In 1906 the executors and trustees accounted, and their accounts were settled by a decree of the said Surrogate's Court, duly entered on March twenty-fourth of that year. No account has since been filed. In the meantime Edward Wells, Jr., one of the said executors and trustees, died, and decedent's widow married again and is now known as Bessie L. Rubens. In November, 1914, Gladys M. L. Ainslie (formerly Gladys M. L. Fox), the said daughter of decedent, filed a petition upon which a citation was issued directing the surviving executrix and trustee to show cause why she should not file an account of her proceedings from and after the 19th day of February, 1906, which was the date of the last accounting. Upon the return of the said citation she appeared and answered, setting up, among other things, that on the 17th day of September, 1913, and subsequent to the date when the said George L. Fox, Jr., became of age and the original trust contained in said will had terminated, all of the persons interested in the remainder entered into a mutual agreement for a distribution

thereof in accordance with the terms of the said will; that at that time a full and complete accounting as to said estate was made, with the exception of one parcel of real estate which was left in joint ownership and which was expressly excepted therefrom; that such distribution was then made, and at that time the parties, including the petitioner in these proceedings, executed and delivered a waiver of the filing of any account, and a general release to the surviving executrix and trustee from all liability ever to render any account respecting her administration of the estate, except as to the one-third thereof as to which she was to have the income from the date when George L. Fox, Jr., attained his majority and during her life. Although there seems to be no statutory provision authorizing the same, the petitioner, not without propriety, filed a reply to the affirmative matters set up by way of defense in said answer, and alleged that the execution of the said waiver and the said general release was obtained by fraud, deceit and false representations, in that she was not truly advised as to the condition of said estate or the amount thereof, or the portion to which she was entitled, and that she had not received the same. To enable the petitioner to maintain these proceedings, it must affirmatively appear that she is "a person interested in the estate or fund" or a "person beneficially interested in the execution of any of the trusts" contained in the said will. (Code Civ. Proc. § 2727, subd. 1, ¶ a; Id. subd. 3, ¶ a.) Without passing upon the questions raised by the answer to the petition and the reply thereto, the Surrogate's Court made an order requiring the sole surviving executrix and trustee to render and file an account of her proceedings as prayed for in said petition. From this order an appeal was taken. The issues thus raised are, in our opinion, triable in the Surrogate's Court. (Code Civ. Proc. § 2510; Matter of Cary, 77 Misc. Rep. 606; Matter of Delgado, 79 id. 590.) By the section above referred to, the Surrogate's Court is authorized "upon the return of any process to try and

determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, * * * as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matters by such order or decree as justice requires." Having the jurisdiction, we think it was the duty of the court, in the first instance, to try and determine the question of petitioner's interest in the said estate. If such issues were decided in favor of the executrix and trustee, the petitioner is not entitled to maintain this proceeding as to any of said estate, except as to that still held in trust for the former widow of the decedent. While there is no express statute providing for the separate trial of issues in the Surrogate's Court, it is provided, generally, with regard to courts of record, that "The court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case." (Code Civ. Proc. § 973.) If statutory authority is needed for such separate trial, we think this provision sufficient. But the order here reviewed apparently decides in advance that the release is ineffective, without having listened to the evidence respecting the execution thereof. It would be involving the executrix in unnecessary expense, and would serve no useful purpose, to require her to file an account of her proceedings, if the petitioner is not entitled to maintain these proceedings. We have not overlooked the fact that, as to that portion of the estate which after the alleged division thereof was to be held and invested for the benefit of the widow during her life, the petitioner at present has a contingent interest. Nor have we overlooked the statutory provision that the surrogate, of his own motion, may direct the testamentary trustee to make and settle an intermediate account of her proceedings. (Code Civ. Proc. § 2724.) The order as entered goes very much further than to require an account, intermediate or otherwise, with regard to the portion of the estate above referred to. We do not now consider the sufficiency or validity of section

2538 of the Code of Civil Procedure, as it is inapplicable to the present situation. There is no "constitutional right of trial by jury" of the issues raised by the answer and reply. At the same time with the order directing the executrix and trustee to account, the surrogate made another order, enjoining her from selling, assigning, transferring, pledging or in any way disposing of any of the property, either real or personal, belonging to the said estate, with the exception of the homestead property, then in possession of one William J. Brown under an option to purchase the same. The executrix and trustee has also appealed from this order, but states that she has no objection to the same, provided that acquiescence therein shall not be deemed to be a concession on her part as to the right of the petitioner to the order for an accounting. We do not think that it has any such effect. Our decision will be that the injunction order of December 31, 1914, shall be affirmed, without costs, and that the order of the same date, requiring the surviving executrix and trustee to account, shall be reversed, with ten dollars costs and disbursements, and the proceeding remitted to the surrogate of Putnam county for the preliminary trial of the issues raised by the new matter set up in the answer of the executrix and trustee and the reply thereto, and without prejudice to an application for an accounting as to so much of the estate as is still held for the benefit of decedent's widow.

JENKS, P. J., CARR, RICH and PUTNAM, JJ., concurred.

Injunction order of the Surrogate's Court of Putnam county of December 31, 1914, affirmed, without costs; order of same date, requiring the surviving executor and trustee to account, reversed, with ten dollars costs and disbursements, and proceeding remitted to said court for the preliminary trial of the issues raised by the new matter set up in the answer of the executor and trustee and the reply thereto, without prejudice to an application for an accounting as to so much of the estate as is still held for the benefit of decedent's widow.

GERTRUDE A. FORMAN, Respondent, v. WILLIAM H. YOUNG, Appellant, Impleaded with FARMERS' LOAN AND TRUST COMPANY and NATHAN A. SEAGLE, as Executors of and Trustees under the Last Will of CAROLINE A. BRUNDAGE, Deceased, and Others, Defendants.

(*Supreme Court, Appellate Division, First Department, March 28, 1915.*)

TRUST—DEATH OF EXECUTORS AND TRUSTEES BEFORE EXECUTING POWER OF SALE—VESTING OF UNEXECUTED TRUST IN SUPREME COURT, UNDER SECTION 111 OF REAL PROPERTY LAW—VALIDITY OF SALE BY TRUSTEE APPOINTED BY COURT.

A testator gave, devised and bequeathed all the rest, residue and remainder of his property in trust, expressly authorizing and empowering his "executrix and executors or such of them as may act for the time being whenever in their discretion it shall be necessary or expedient to sell any or all of my real estate either at public or private sale and to execute and deliver good and sufficient deed or deeds for the same." The will also provided as follows: "And I further expressly authorize and empower my said executrix and executors * * * if in their discretion they shall deem it beneficial for those interested instead of selling my real estate for the purpose of partition, to allot and divide to and among my said children and their descendants any part thereof * * * it being my will and intention to leave the right and manner of such partition and allotment wholly to the discretion of my said acting executrix and executors." All the persons named in the will as the executors thereof died without having executed the power of sale.

Held, that the trust being unexecuted vested in the Supreme Court, under section 111 of the Real Property Law, giving said court all the power and duties of the original trustee;

That a sale by a trustee appointed by the court for the purpose of executing the trust was valid.

APPEAL by the defendant, William H. Young, from part of an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 15th day of April, 1912, upon the decision of the court after a trial at the New York Special Term.

John J. Crawford of counsel (Brush & Crawford, attorneys), for the appellant.

Harold Swain of counsel (Hamilton C. Rickaby with him on the brief), David B. Simpson, attorney, for the respondent.

CLARKE, J.—The action was brought to procure the construction of the will of Annie P. Burgess. An incidental question which was submitted to and decided by the Special Term, and is now the only matter before us upon this appeal, arose in the manner following:

In paragraph VII of the complaint it is alleged: "That in and by the Sixth paragraph of said will, testatrix provided among other things as follows: 'After the decease of my husband Dr. Daniel M. Burgess, I give and devise to my said niece Gertrude Forman the house and lot known as number 168 East 79th Street, Borough of Manhattan, City of New York, to have and to hold the same for and during her natural life, and after her death, I give and devise the same to her two sons now living, share and share alike.' * * *

"That at the time of the death of said Annie P. Burgess, there was a past due bond and mortgage of \$18,000, executed by said Annie P. Burgess on said premises. That plaintiff is advised that in and by the terms of said will it was the intention of said testatrix that plaintiff and her two sons should take the property free and clear of said mortgage. That plaintiff has called upon the executors and trustees to pay off said bond and mortgage out of the other assets of the estate, but they have refused to do so, and the said bond and mortgage now remain past due obligations of record against said premises."

The defendant William H. Young, who is a grandson of John S. Young, set up in his answer, by way of a partial defense, a claim to an undivided one-eighth interest in the premises by virtue of a devise in the will of his grandfather, which interest

he alleged had not been divested by the attempted sale of said house and lot to Mrs. Burgess by the trustee appointed to execute the unexecuted trusts under his grandfather's will.

Said claim affects forty-six other pieces of property sold by said trustee. The learned Special Term decided against said defendant and from that portion of the judgment he appeals.

By his will John S. Young after certain specific bequests and devises provided as follows:

"*Thirteenth.* I give, devise and bequeath all the rest, residue and remainder of my property and estate, real and personal of every name, nature and description unto my executrix and executors, and the survivors and survivor of them or such of them as shall act for the time being, In Trust, as follows: To pay my said wife one-half part of the net rents and income of my real estate as hereinabove directed. To invest and keep invested all the said rest, residue and remainder of my said personal estate, or the proceeds thereof, and to pay over the income thereof together with the remaining half part of the net rents and income of my real estate to and among all my said children hereinbefore named in equal shares for and during their respective lives, excepting alone from this provision the portion or share of my son John D. Young, which shall be disposed of as follows: I direct my executors to pay one half part of the share of the rents and income of which the said John D. Young, would be entitled to Josephine Young, wife of the said John D. Young, for and during the life of the said John D. for the support and maintenance of herself and her daughter, Gertrude, or in case of the death of said Josephine before her said husband, then to apply the same to the education, support and maintenance of the said Gertrude and to pay and apply the other half part of said share of rents and income or so much thereof as may be necessary to the use and benefit of my said son John D. Young for his comfortable and suitable support and maintenance, or if in the exercise of the sound discretion my

said executors should deem it advisable so to do, to pay to my said son the whole of said half part of his share of said rents and income or such part thereof as they may deem proper. Upon the decease of either of my said children, Anna P. Bogert, Caroline Amelia Brundage, or Wm. Henry Young, leaving descendants, her or him surviving, I give and bequeath and devise unto such descendants the one equal fourth part of the said rest, residue and remainder of my personal estate and the one equal fourth part of the one-half part of my real estate above referred to and of which the rents and income are above directed to be paid for the benefit of the ancestor of such descendants, they to take by representation absolutely.

"Upon the decease of my said son John D. Young, I give, devise and bequeath the one equal fourth part of said personal estate and the one fourth of the one-half part of my real estate above referred to (being the portion directed to be applied to the use of my said son and his wife and daughter) to such of my other children as may be living at that time in equal shares absolutely. In case any of my said children shall die without leaving lawful issue then I give, devise and bequeath the share of which such child is to receive the rents and income as above directed to my surviving children in equal shares absolutely.

* * *

"*Fourteenth*, I hereby expressly authorize and empower my said executrix and executors or such of them as may act for the time being whenever in their discretion it shall be necessary or expedient to sell any or all of my real estate either at public or private sale and to execute and deliver good and sufficient deed or deeds for the same. The proceeds of such sale to take the place and to be disposed of in the same manner as the real estate so sold would have been under and by this will.

"And I further expressly authorize and empower my said executrix and executors or such of them as shall act for the time being, if in their discretion they shall deem it beneficial

for those interested instead of selling my real estate, for the purpose of partition, to allot and divide to and among my said children and their descendants any part thereof in such manner that my said children and their descendants shall take and receive the portions and interest hereinabove given and devised to them, at such time and times as they shall become entitled to receive the same, it being my will and intention to leave the right and manner of such partition and allotment wholly to the discretion of my said acting executrix and executors."

The testator's son William died in 1899, leaving one descendant, the appellant, who was then an infant of the age of ten years. The testator's widow died in 1898 and the son John in 1892, intestate, leaving him surviving as his only heir at law the plaintiff in this action, his daughter. All the persons named in the will as the executors thereof died without having executed the power of sale. Thereafter, William R. Wilcox on December 8, 1899, was duly appointed by the Supreme Court to execute the unexecuted trusts of the will, and by decree duly made and entered was directed to sell the real estate of said John S. Young, deceased, including the premises 168 East Seventy-ninth street aforesaid. Mr. Wilcox as such trustee sold various parcels of real property. Among them the premises above mentioned were sold to Annie P. Bogert, subsequently Annie P. Burgess. It is stipulated that if the power of sale could be exercised by a trustee appointed by the Supreme Court all the proceedings were in all respects regular.

This sale took place in 1900, when the appellant was eleven years of age, and a portion of the proceeds was paid over to his mother as his general guardian. Two days after the appellant became twenty-one years of age his guardian paid over to him all the moneys in her hands as such guardian which payment included the moneys or a part thereof received by the guardian from the substituted trustee.

The appellant claims that when the sale was made the trust

as to the undivided one-eighth interest in question had terminated, and the appellant was vested with the entire legal and equitable title thereto; and the power, being expressly made to depend upon the will of the donees, had been extinguished by their deaths.

Undoubtedly at the time of the sale by the death of certain of the *cestuis que trust*, William H. Young had acquired a one-eighth undivided interest in the trust estate. But that trust estate still existed and the trusts thereunder had not been fully executed. I think it is quite clear that if the sale had been made by the executors as trustees there could be no question but that it was legal.

In *Cussack v. Tweedy* (126 N. Y. 81), the will under consideration gave the residue of testator's property to his executors in trust for the benefit of his four children, creating four separate and several trusts, each covering an undivided one-fourth of the residue. The trusts were to pay the income to each child for his or her life, and at his or her death to convey such share with any unapplied rents to such child's issue. Each one of the separate trusts was for a single life, the termination of which by death ended the trust and vested a fee in possession in the remaindermen. After the creation of these trusts the will conferred a power of sale from time to time and at any time or times to sell and dispose of the whole or any part or parts of the estate. Judge FINCH said: "The sole surviving executor is the present defendant, who as such tendered a deed duly executed under and in pursuance of the authority of the will. By the death of one of the daughters an undivided fourth of the estate had vested in her issue, and the purchaser claims that the power of sale as to such one-fourth, ended with the determination of the trust, while the executor claims that the power survived and would continue until all the trusts were ended. We have held on the one hand that such a power of sale, when general and unlimited and unre-

stricted, does not become inconsistent with the devise of a vested estate in the same property (*Crittenden v. Fairchild*, 41 N. Y. 289; *Kinnier v. Rogers*, 42 id. 531; *Skinner v. Quin*, 43 id. 99), and on the other hand that where the power is in terms restricted and limited in point of time to the continuance of the respective trusts, the ending of the trust ends also the power. (*Bruner v. Meigs*, 64 N. Y. 506.) It would be difficult to frame a power of sale more broad and unrestricted than the one before us. It covers not merely the residue embraced in the trust, but the whole estate, and is unlimited as to time. It necessarily falls under the authorities first cited, unless we can find in its terms some definite indication that all the purposes for which the power was given, necessarily ended when any one of the four trusts terminated, and that the remainders were given, not subject to the power, but entirely freed from it. There seem to have been two purposes which the power was intended to accomplish: one to enable changes to be made in the capital of the estate with a view to the safety of investments and an increase of the earning power; and the other to facilitate an ultimate division without the expense and delay of a partition. Neither purpose was bounded by the limits of a single one of the trusts; each might remain unaccomplished, though a single one of the trusts had fallen in. * * * We are thus of opinion that the power subsisted beyond the death of Mrs. Tweedy, and that the executor's deed was good."

The power in the will under consideration is as broad as that contained in the will interpreted in the *Cussack* case. Indeed its exercise is expressly contemplated after vesting because it provides: "And I further expressly authorize and empower my said executrix, and executors, * * * if in their discretion they shall deem it beneficial for those interested instead of selling my real estate, for the purpose of partition, to allot and divide to and among my said children and their descendants any part thereof, * * * it being my will and inten-

tion to leave the right and manner of such partition and allotment wholly to the discretion of my said acting executrix and executors." As there could be no partition of the real estate until vested, because, *ad interim*, it was a trust estate in the hands of the trustees, it is even more obvious than it was in the Cussack case that it was the intention of the testator that the power to sell should survive vesting of title in the remaindermen.

All of the donees of the power, namely, the executrix and executors, the trustees under the will, having died without the execution thereof the trusts provided for in the will were left unexecuted.

At the time of the execution of the will of John S. Young, namely, March, 1879, and at the time of his death, June 24, 1880, and at the time of the probate of the will, July 3, 1880, section 68 of title 2 of chapter 1 of part 2 of the Revised Statutes (1 R. S. 730) was in force which provided: "Upon the death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the Court of Chancery, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court."

Section 101 of title 2 of chapter 1 of part 2 of the Revised Statutes (1 R. S. 734) was as follows: "Where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the Court of Chancery."

At the time of the appointment of Mr. Wilcox and the sale of the property by him in 1900, section 68 (*supra*) had been carried into the Real Property Law (Gen. Laws, chap. 46; Laws of 1896, chap. 547), where it appeared as section 91. "On the death of the last surviving or sole trustee of an express trust, the trust estate shall not descend to his heirs nor pass to his next

of kin or personal representatives; but in the absence of a contrary direction on the part of the person creating the same, such trust, if unexecuted, shall vest in the Supreme Court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose under the direction of the court, who shall not be appointed until the beneficiary thereof shall have been brought into court by such notice in such manner as the court or a justice thereof may direct."

Section 101 (*supra*) at that time had become section 141 of the Real Property Law without change except the phraseology and the substitution of the words "Supreme Court" for the Court of Chancery.

Section 91 was amended by chapter 151 of the Laws of 1902 by changing the phraseology and by adding provisions in regard to security, accounting and compensation.

Said section 91, as amended, became section 111 of the Real Property Law (Consol. Laws, chap. 50; Laws of 1909, chap. 52) and was subsequently amended by chapter 216 of the Laws of 1911. Section 141 of the former Real Property Law is now section 161 of the Real Property Law (Consol. Laws, chap. 50; Laws of 1909, chap. 52).

In *Delaney v. McCormack* (88 N. Y. 174), in an action to construe a will and for the appointment of a trustee to carry out its unexecuted provisions, held, that the will created a general power in trust, the execution whereof was imperative (1 R. S. 732, §§ 74, 77; *Id.* 734, §§ 94, 96); that upon the death of the surviving trustee his powers and duties became vested in the court and might be exercised by some person appointed by it for that purpose. (1 R. S. 734, § 102; *Id.* 730, § 68.)

In *Matter of Runk* (200 N. Y. 447, 462) Judge WERNER, writing for a unanimous court, said: "There are several reported cases decided in the Supreme Court * * * in which it was held that upon the death of a last surviving trustee of a trust that remains unexecuted, the trust, by virtue of the ex-

press terms of the statute, devolves upon the court, which is thereupon authorized to appoint a person to execute the trust, but that no power exists to appoint a new trustee. (*Brater v. Hopper*, 77 Hun, 244; *Faile v. Crawford*, 30 App. Div. 536; *Wildey v. Robinson*, 85 Hun, 362; *Jewett v. Schmidt*, 83 App. Div. 276; *Matter of Gueutal*, 97 App. Div. 530.) The theory upon which these cases were decided is clearly stated by the late, Mr. Justice PATTERSON in *Matter of Gueutal*, as follows: 'There is no authority in section 91 of the Real Property Law * * * for appointing a "substituted trustee" by that name. In such a case as this, the trust, if any, has devolved upon the court, and it has power to appoint some one as its hand and representative to execute the unexecuted parts of a trust, with all the powers and duties of the original trustee, but under the direction of the court.' (p. 531.) It seems to us that these cases place too much emphasis upon mere nomenclature as indicating a distinction between persons appointed to execute trusts which have devolved upon the court, and persons appointed by last will and testament. There is, of course, a technical distinction but no real difference. The duties of such a person appointed by the court are the same whether he is called 'the right hand of the court,' or is referred to as a 'substituted trustee;' and that seems to have been the view entertained by this court in *Matter of Carpenter* (131 N. Y. 86) where a person appointed to succeed a sole surviving trustee of an unexecuted trust was denominated 'a new trustee.'

In *Lahey v. Kortright* (132 N. Y. 450) testator created certain trusts, appointed two persons executors and trustees and provided in his will: "I give my executors full power and authority in regard to the investments of my said estate, and for this purpose they are authorize to sell and convey any or all of my real and personal estate, and after the payment of my debts as hereinbefore provided, to invest the proceeds in other real estate or in personal securities as they, in their dis-

cretion, may deem most for the interest of the parties interested in my estate." The persons named in the will renounced. Letters of administration with the will annexed were issued to the widow and another person. By judgment in an action for partition and for the appointment of a trustee in place of those who had so renounced, one Collins was appointed such trustee. Several years afterwards said trustee was permitted to surrender the trust and was released and discharged therefrom and subsequently Lawrence M. Kortright was appointed trustee of the share of his brother Gouverneur Kortright, and the latter was appointed trustee of the respective shares of the widow and Lawrence M. The court said: "The will from which the power of the trustees is derived, created an express trust within the meaning of the statute, as it provided for the receipt by them of the rents and profits or income of lands and the payment of the same over to the beneficiaries during their lives. (1 R. S. 728, § 55.)* And for that purpose the trustees took title to the lands embraced within the trust. (Id. 729, § 60; *Brewster v. Striker*, 2 N. Y. 19; *Leggett v. Perkins*, Id. 297.)

" * * * * It is, however, insisted on the part of the plaintiff that neither the trustee Collins nor his successors in that relation took any power of sale under the will. The determination of this question depends upon the construction and application of the provisions of the eleventh clause. It is forcibly argued by the learned counsel for the plaintiff that the power of sale given by such clause is not attached to the trust before mentioned, and has no relation to its execution, but that it was intended as a power to the executors as such to be executed only prior to the division of the estate into the shares provided for, and, as such, was one of personal confidence, and could be exercised by none other than the persons designated as

* Amd. by Laws of 1830, chap. 320, § 10.—[REp.]

executors by the testator, and that when they failed to assume such relation the power became inoperative. It would be less difficult to adopt the view that this was a naked power if it were not for the trust created by the preceding provision of the will. But the power of sale given by this provision does not embrace within its terms as expressed, any purpose necessarily executorial; and for the discharge of their duties as executors no reason appears for the exercise by them of the power of sale for the purposes of investment of the proceeds. It is true that the expression in the eleventh clause in reference to the payment of debts of the testator, has relation to the duties of the executors, and the power of sale is in terms broad enough to cover his entire estate. But it did not purport to have been created for use in making the division provided for of the estate. No power was given the executors as such to withhold distribution of the personal property (if any should remain after payment of the debts), or to delay the division of the real estate, or to withhold from the beneficiaries the shares which they were entitled to take and appropriate to their own use. It, therefore, does not appear to have been intended that the power of sale should not survive the division of the estate. The purpose, as given for its execution, had relation to the investment of the proceeds in other real estate or personal securities. While a mere power of sale is discretionary and does not survive the donee of the power, it is otherwise when the power is coupled with a trust. Then it is taken by the trustees, and through the court of equity may be transmitted to their successors in the trust. In the present case the power of sale independent of and disconnected with the trust to receive and apply the rents and profits, would not have survived the renunciation of the persons named as executors. But by reference to the provisions of the will, as well that creating the power of sale as other portions, to ascertain its applicability contemplated by the testator, it seems that this power in its practical and essen-

tial purpose was intended to be applicable to the subject of the trust, which was to continue during the lives respectively of the beneficiaries. And being thus annexed to such trust in aid of its execution it would be taken by the trustees. In that view of its relation it is unnecessary to further pursue inquiry into the character of the power. (*Leggett v. Hunter*, 19 N. Y. 445.)

"The cases cited upon the contention that this power was discretionary and could not be taken by the substantial trustees, do not seem to us to have any necessary application to the present case."

The court then considered *Coleman v. Beach* (97 N. Y. 545); *Matter of Bierbaum* (40 Hun, 504); *Sweeney v. Warren* (127 N. Y. 426), and *Mott v. Ackerman* (92 id. 539), distinguishing them upon the ground that there was no trust with which the power was connected and that the power was purely personal and discretionary.

"It is further urged that although the power of sale may have been by the will vested in the trustees there appointed, if they had assumed the trust, it was not conferred upon the defendant trustees because: (1) Their appointment was made by the court in the exercise of its general equity powers in that respect and not pursuant to the statute upon the subject, and (2) that the power of sale was not included in that conferred upon them by the orders of appointment.

"By the judgment of the court Collins was appointed trustee under the will, and as such trustee invested with power and authority to execute the trusts created by it. And upon his petition to be relieved from the trust he was, by order of the court, permitted to surrender his trust and was discharged from liability, etc. This was a resignation within the meaning of the statute pursuant to which the defendants were appointed as new trustees (1 R. S. 731, § 71),* and by

* 1 R. S. 730, § 71.—[*Rep.*

the terms of the orders appointing them, they respectively were appointed trustees under the will to hold the shares set apart by the commissioners for the benefit of the beneficiaries, and to hold the same in trust for them. The court did not by these orders assume to limit in terms the power of the new trustees or definitely define the manner they should execute the trust. And by reference to the entire record of the proceedings, in that behalf it seems that the purpose was to substitute them as successors to Collins in the trust created by the will, from which, through the action of the court in placing them in that relation, they derived their powers. (*Farrer v. McCue*, 89 N. Y. 144; *Royce v. Adams*, 123 id. 402; *Nugent v. Cloon*, 117 Mass. 219.)"

In *Smith v. Floyd* (124 App. Div. 277), the majority of this court held that when testamentary trustees are empowered "to apply such portion of the capital of the trust funds as they may deem advisable to the use" of beneficiaries named, the discretionary power does not pass to a substituted trustee appointed by the court, for the discretion was wholly personal to the trustees first named, and the exercise thereof is not necessary to the execution and furtherance of the trust. The cases on the subject are collateral in the two opinions written. The majority opinion said: "The question to be determined in each case is as to the test which the donor of the power intended should be determinative as to its exercise. If she made that test solely the personal discretion of the trustees it is clear that the power cannot be delegated or pass to another, for that would be to substitute the discretion of another for that discretion which the donor relied upon. If, however, the test upon which the exercise of the power is made to depend is some fact which can be as well ascertained by the court or by a substituted trustee, as by the trustee originally named, it may well be held that the power may be devolved, for thus can the intention and desire of the donor be fulfilled. * * * There are undoubt-

edly cases in which a substituted trustee has been permitted to exercise power of sale and other powers incident to the execution of the trust, which have involved the element of personal discretion. (*Haendle v. Stewart*, 84 App. Div. 274; *Lahey v. Kortright*, 132 N. Y. 450; *Matter of Wilkin*, 183 id. 104.) In all of these cases, however, it was necessary that the power should be exercised in order that the trust might be executed, and the devolution of the power has been upheld in furtherance of the trust." In the dissenting opinion of Mr. Justice INGRAHAM, upon which the case was reversed (193 N. Y. 683), it was said: "There is coupled with this power a power of sale of the real property of the testatrix, * * * language which would seem to indicate a dependence upon the personal discretion of the trustees much more than the language in relation to the advancement of a portion of the property for the support of her daughter. Yet there could be no doubt, I think, that a substituted trustee could exercise this power. The power given was to be exercised in both cases during the whole existence of the trust, which was not limited upon the lives of the trustees, and the necessities of the daughter would increase as she became older. In determining whether or not a testatrix intended that a discretion with which her trustees were vested was one that must be exercised by the trustee named, and was not intended to be exercised by a substituted trustee, attention, I think, should be given to the nature and extent of the power and the period during which it was contemplated that it would be necessary to exercise the power. It seems to me quite evident that the creator of the trust could not have intended to limit the exercise of the power to the continuance in office of the trustees originally appointed, as such a construction would defeat the express intention of the creator of the trust."

In *Burtis v. Trowbridge* (142 App. Div. 449), where a testatrix gave all her property to her executor *eo nomine* in trust to pay debts and legacies, with direction to hold the residue and

pay the income to her husband for life with remainders over, and there were no debts, and the personal property greatly exceeded the legacies, it was held that a power given to the executor *eo nomine* to "sell * * * and do all acts to carry out and execute the provisions and trusts" is not discretionary, and passes to a substituted trustee who can convey a good title. Mr. Justice MILLER said: "The question involved is whether the power of sale was discretionary, or whether it was coupled with the trust and survived the payment of debts and legacies. The mere fact that it was given to the executor *eo nomine* is of no consequence because nowhere in the will is the word 'trustee' used. The property was given to the executor in trust for three purposes, two of which were in their nature executorial. But it is manifest that the testatrix did not anticipate the exercise of the power of sale either to pay debts or legacies, as she had no debts, and left personal property many times in excess of the two small legacies. The trust for the third purpose was to continue for an indefinite time, *i. e.*, during the life of the husband, and the testatrix may well have anticipated that, in the execution of it, it might become convenient or necessary to sell the real estate. At any rate, by a process of elimination it becomes evident that that was the only purpose for which the power could have been given. It necessarily follows that the power passed to the substituted trustee, and that his grant effectually conveyed the title. (*Lahey v. Kortright*, 132 N. Y. 450.)"

In the case at bar the trust being unexecuted vested in the Supreme Court with all the powers and duties of the original trustee; and so it lay within the power of the court to appoint a trustee to execute the unexecuted trusts created by the testator. To that substituted trustee was intrusted the power of sale which had been conferred upon the executors by the will of the testator in aid of and for the purpose of carrying out the

testamentary disposition of his property in the form of a trust estate.

As it is stipulated that if the power of sale could be exercised by a trustee appointed by the Supreme Court the proceedings were in all respects regular, this court having reached the conclusion that such power could be so exercised, it follows that the judgment appealed from should be affirmed, with costs and disbursements to the respondent.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and SCOTT, JJ., concurred.

Judgment affirmed, with costs.

ELIZABETH RASTETTER et al., Infants, by LOUISE MAIS-WAGENER, Their Guardian ad Litem, Respondents, v. JOHN C. HOENNINGER, as Executor of and Trustee under the Will of FRANK RASTETTER, Deceased, et al., Appellants.

(Court of Appeals, February 5, 1915.)

WILL—JOINT WILL BY HUSBAND AND WIFE*—PROVISIONS OF SUCH WILL

* See note Mills Surr., Vol. II, p. 81.

CONSTRUED AND HELD TO OPERATE AS AN AGREEMENT BINDING UPON SURVIVOR AS TO DISPOSITION OF PROPERTY OWNED BY EITHER PARTY AT DEATH OF EITHER OF THEM.

1. A person may enter into a valid agreement to make a particular testamentary disposition of his property. As a will an instrument is revocable at pleasure, but as a contract, if supported by an adequate consideration, it is enforceable in equity.

2. A joint will made by husband and wife contained, among others, the following provisions: "This and this only to be our last mutual and joint Will and Testament. * * * We give unto the survivor of either of us, the income of our real and personal property * * *. After the death of the survivor of either of us, all our property both real and personal, shall be divided in the manner following:" *Held*, that al-

though no one of the foregoing considerations standing alone might be sufficient to establish a contract, the cumulative effect of all when viewed together is so persuasive as, unexplained, to prove that the joint will was made pursuant to an agreement, so that after the agreement had been executed by one dying without making a different testamentary disposition of his property, and after the acceptance by the other of the benefits of the agreement, it became obligatory upon the latter and enforceable in equity upon his death. Each, during his life, remained the absolute owner of his own with all the rights of an owner, and upon the death of the wife the husband became trustee of her personal estate for the remaindermen.

3. To the extent that certain real estate, which was devised by the husband, who survived the wife, was purchased by him with money belonging to the estate of the wife, or in case it be shown that it was given by him to one of the defendants in contemplation of the donor's death or to avoid in good faith the performance of the agreement made between him and his wife, equity may impress a trust upon it in favor of the beneficiaries under the joint will.

Rastetter v. Hoenninger, 157 App. Div. 553, reversed.

(Argued November 30, 1914; decided February 5, 1915.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 28, 1913, modifying and affirming as modified a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term.

On September 4th, 1902, Franz and Elizabetha Rastetter, being then husband and wife, jointly executed the following instrument:

"In the name of God, Amen: We, Franz Rastetter and Elizabetha Rastetter, his wife, of the Borough of Manhattan, City of New York, being of sound mind and memory and mindful of the uncertainty of human life, do now make, publish and declare this and this only to be our last mutual and joint Will and Testament in manner following, viz.:

"First. We order and direct our executor or executrix, as the case may be, to pay all our just debts and funeral expenses out of our personal estate.

"*Second.* We give unto the survivor of either of us, the income of our real and personal property, during his or her natural life for his or her own use and benefit.

"*Third.* After the death of the survivor of either of us, all our property both real and personal, shall be divided in the manner following:

"One-half thereof is to be paid to our daughter, Barbara Schmidt, if living at the time of the distribution of the estate, and if not living at the time of the distribution of the estate, her share shall be equally divided between her children then living, and the remaining one-half thereof to our son, John Rastetter, if living at the time of the distribution of the estate, and if not living, same shall be equally divided between his children then living.

"We hereby nominate, constitute and appoint the survivor of either us, executor or executrix, as the case may be, of this our mutual and joint Will and Testament.

"Giving the said executor or executrix, as the case may be, full power to sell any real estate, either owned jointly or separately, at public auction or private sale, which he or she may think most advantageous to the estate, with the power to reinvest said money in (*sic*) by purchasing real estate or investing same on mortgage on New York City real estate, with the power to mortgage or lease any real estate owned by us either jointly or severally.

"Hereby revoking all other and former wills by us at any time heretofore made, we again declare this, and this only, to be our last mutual and joint Will and Testament.

"*In Witness Whereof*, we have hereunto set our hands and seals this 4th day of September, 1902."

Elizabetha Rastetter died January 4th, 1905, leaving her husband and their two children, surviving. Said instrument was probated as her will, and her husband was appointed executor thereof.

Franz Rastetter died August 27th, 1908. His son John Rastetter predeceased him, leaving a widow and several minor children, who are the plaintiffs herein. On August 1st, 1907, Franz Rastetter executed an individual will, which was duly probated, by which he gave one-half of his estate absolutely to his daughter Barbara Schmidt. The other half he gave to his executors in trust to hold for the benefit of the children of his son John until the youngest should become thirty years of age, when it was to be divided among them equally. After the death of Elizabetha and prior to September 17th, 1906, Franz entered into a contract to purchase a parcel of real estate for the sum of \$11,100, subject to a mortgage of \$6,500, and on that date took title in the name of his daughter Barbara Schmidt, which she still retains. The trial court found: "That Franz Rastetter purchased the aforesaid real estate with money that came from the estate of Elizabetha Rastatter, deceased, and money subject to the contract contained in the 'joint and mutual' will hereinbefore set forth, which was admitted to probate as the last will and testament of Elizabetha Rastetter, deceased, and made gift thereof to the defendant Barbara Schmidt."

The action was brought by the children of the deceased son John to enforce the provisions of the joint instrument executed by Franz and Elizabetha Rastetter and incidentally to establish the plaintiffs' beneficial ownership of one-half of the said real property purchased in the name of the defendant Schmidt, and to compel her to account for the rents and profits thereof.

The action has been twice tried. At the first trial the complaint was dismissed. The judgment entered thereon was reversed by the Appellate Division by a divided court. Upon the second trial judgment was rendered in favor of the plaintiffs, which was affirmed by the Appellate Division, also by a divided court, with a modification as to the form of the judgment not necessary to be here set forth.

Andrew C. Troy for appellants. An agreement is necessary in order to make a mutual and joint will binding upon the survivor. Unless there is such an agreement a mutual and joint will is as revocable as any other will, and even if there is an agreement the will is nevertheless revocable, although in equity the agreement may be enforced. (*Ex parte* Day, 1 Bradf. 476; *Matter of Keeps*, 2 N. Y. Supp. 750; *Matter of Gloucester*, 11 N. Y. Supp. 899; *Kline v. Farrell*, 71 App. Div. 219; *Edson v. Parsons*, 85 Hun, 263; 155 N. Y. 555; *Wallace v. Wallace*, 71 Misc. Rep. 305.) A joint and mutual will of itself does not show a contract to make mutual wills, and never to revoke the same which may be enforced in equity. The mere making of a joint and mutual will is insufficient to indicate a binding contract, irrevocable after the death of either party. (*Younger v. Duffie*, 95 N. Y. 539; *Hubbard v. Hubbard*, 12 Barb. 153; *Wilkes v. Burns*, 60 Md. 64; *Smith v. Bell*, 6 Pet. [U. S.] 68; *Williams v. Tolbert*, 66 Ga. 127; *Cunningham v. Davis*, 62 Misc. Rep. 366; *Matter of Diez*, 60 N. Y. 88; *Matter of Stracey*, 1 Deane Eccl. 6; *Matter of Raine*, 1 Sw. & T. 144; *Hobson v. Blackburn*, 1 Add. 274.) The plaintiffs are not entitled to a judgment of specific performance, for the reason that they have failed to prove, by clear and satisfactory evidence, that a contract existed between Franz Rastetter and Elizabetha Rastetter, or to prove definitely and explicitly the terms of the contract. (*Edson v. Parsons*, 85 Hun, 263; *Herrick v. Snyder*, 26 Misc. Rep. 462; *Gall v. Gall*, 29 Abb. [N. C.] 22; 138 N. Y. 675; *Mahaney v. Carr*, 175 N. Y. 454; *Conlon v. Mission*, 34 App. Div. 507; *Ripson v. Hart*, 64 App. Div. 593; *Hanly v. Hanly*, 105 App. Div. 335; *Shakespeare v. Markham*, 72 N. Y. 400.) Even assuming that this joint and mutual will raises the presumption of an agreement, which is binding upon Franz Rastetter, what the parties intended was that the individual property of each should go to the survivor for life, and the property which the survivor had at his death should go in the man-

ner provided for in the alleged joint and mutual will, dated September 4, 1902. (Johannes v. Martian, 22 App. Div. 561; Mahaney v. Carr, 175 N. Y. 454; Roehl v. Haumesser, 114 Ind. 311; Austin v. Davis, 128 Ind. 472; Van Duyne v. Freeland, 12 N. J. Eq. 142; Gall v. Gall, 29 Abb. [N. C.] 19; 138 N. Y. 675; Repsom v. Hart, 64 App. Div. 593.) Franz Rastetter did not waive any rights of survivorship by making the joint and mutual will. (Torrey v. Torrey, 14 N. Y. 430; Kelly v. Beers, 194 N. Y. 49; Wyche v. Clapp, 43 Tex. 543; Schouler on Personal Property, § 159; Bertles v. Nunan, 92 N. Y. 152; Hills v. Fisher, 144 N. Y. 306; Johannes v. Martian, 22 App. Div. 561; Roehl v. Haumesser, 114 Ind. 311; Mahaney v. Carr, 175 N. Y. 454; Austin v. Davis, 128 Ind. 472; Van Duyne v. Freeland, 12 N. J. Eq. 142.)

August P. Wagener for respondents. The agreement can be found by the court from the surrounding circumstances and from the instrument itself. (Edson v. Parsons, 155 N. Y. 555; Herrick v. Snyder, 27 Misc. Rep. 462; *Ex parte* Day, 1 Bradf. 476.) The instrument sought to be enforced in this action is an executed contract although designated a "mutual and joint will." (*Ex parte* Day, 1 Bradf. 476; Edson v. Parsons, 155 N. Y. 555.) The contract contained in the mutual and joint will covered all the property that either testator had or was possessed of at the time of the death of Elizabetha Rastetter on January 4, 1905, and such other property as the survivor thereafter purchased with portions of that estate. (Hamer v. Sidway, 124 N. Y. 538; Anson's Prin. of Cont. 63; Pars. on Cont. 444.)

MILLER, J.—Whatever doubt may once have existed on the point, it is now settled that an instrument jointly executed in due form as a will by two persons may be proved as the will of either. (Matter of Diez, 50 N. Y. 88.) In that case a husband

and wife jointly executed an instrument reciprocally devising their property to the survivor, and it was held that the instrument operated as the separate will of the one first dying. Upon that event the whole purpose of the instrument was accomplished. There is equal reason for holding that, in case of a conjoint will of two persons by which the survivor is given a life estate only with remainder over to a third person, the instrument may successively be proved upon the death of each as his individual will.

It is also too well settled to require the citation of authority that a person may make a valid agreement to make a particular testamentary disposition of his property, but see the opinion of GRAY, J., in *Edson v. Parsons* (155 N. Y. 555, p. 567), the case mainly relied upon by the appellants. As a will an instrument is revokable at pleasure, but as a contract, if supported by an adequate consideration, it is enforceable in equity.

There are no facts disclosed in this case *aliunde* the will itself to establish a contract, and the important question, therefore, is whether the instrument itself imports a contract, as a majority of the Appellate Division have held. We are not prepared to say that the mere fact of a conjoint, reciprocal testamentary disposition by two persons establishes a contract not to revoke, although that seems to have been Lord CAMDEN's ruling in *Dufour v. Pereira* (1 Dickens, 419; 2 Hargrave's Juridical Arguments, 277, 304), a case often cited. Such wills are rare and, it may be, more nearly import a contract than separate mutual wills such as were involved in the leading case of *Lord Walpole v. Lord Orford* (3 Ves. Jr. 402), and in *Edson v. Parsons* (*supra*). In the case at bar the testators took the pains at the beginning and again at the end of the will to declare "this and this only to be our last mutual and joint will and testament." The repetition of that phrase *in haec verba* and especially of the words "and this only" strongly tend to indicate an understanding that neither was to make a different

testamentary disposition of his property in the future, for otherwise those significant words twice carefully used were meaningless. The language of the disposing clause imports the joint disposition of the collective property of both, not the independent disposition by each of his own. It is "we," not "I, Franz, and I, Elizabetha," give the income of "our," not of "my," real and personal property. They did not in express words give, devise and bequeath the remainder upon the death of the survivor, but they said "after the death of the survivor of either of us, all our property both real and personal *shall be divided* in the manner following;" a phrase which again strongly suggests, if it does not alone import, a contract. The testators, husband and wife, provided first for the survivor and ultimately for their children, in whose welfare they were both mutually concerned. Although no one of the foregoing considerations standing alone might be sufficient to establish a contract, the cumulative effect of all when viewed together is so persuasive as unexplained to prove that the joint will was made pursuant to an agreement. Whilst importing a contract the instrument is testamentary in character and as to the property of each speaks from his death. Each was at liberty during his lifetime to use his own as he saw fit, short of making a different testamentary disposition or a gift to defeat the purpose of the agreement, which was that upon his death each was to leave the property of which he was then possessed in the manner agreed upon. Very likely either during their joint lives might upon notice to the other have revoked; but, after the agreement had been executed by one dying without making a different testamentary disposition of his property and after the acceptance by the other of the benefits of the agreement, it became obligatory upon the latter and enforceable in equity upon his death.

Nothing to the contrary was decided in *Edson v. Parsons* (*supra*) which involved separate mutual wills. In that case the trial court found from the wills themselves and the extrinsic

circumstances that there was no contract, and this court held that there was evidence to justify that finding, which was far from holding that even in that case there was no evidence to sustain a contrary finding.

We have examined the cases in other jurisdictions cited by the appellants. Whilst expressions may be found in some which seem to support their contention, in none were the facts the same, or the precise point involved, as in this case. On the other hand, there are decisions in other states, supported by cogent reasoning, which go as far as, or farther than, we are required to go in this case to sustain the ruling of the court below. (*Frazier v. Patterson*, 243 Ill. 80; *Baker v. Syfritt*, 147 Ia. 49; *Bower v. Daniel*, 198 Mo. 289.)

However, the findings are not sufficient to support the judgment with respect to the real property deeded to the defendant Schmidt and the evidence does not enable us to supply the necessary finding. Neither the findings nor the evidence disclose with certainty the source of the money with which said property was purchased, but the theory of the judgment in this respect is that upon the execution of the joint will each of the testators became a trustee of his own property and, whilst entitled to the income, was disabled from disposing of the corpus. As I have already said, we construe the agreement differently. What the parties disabled themselves from doing was the making of a different testamentary disposition after accepting the benefits of the agreement. Each, during his life, remained the absolute owner of his own with all the rights of an owner. Certainly nothing short of plain and express words to that effect should suffice in such a case to limit the use, or to impress a trust upon, the property of each during his own life. Of course, the agreement had to be carried out honestly and in good faith. The survivor could not after accepting the benefits of the agreement make a gift in the nature, or in lieu, of a testamentary disposition or to defeat the purpose of the agreement.

Upon the death of the wife, the husband undoubtedly became trustee of her personal estate for the remaindermen. And if the identical money received from her can be traced to the purchase of the said real estate (see *Matter of Hicks*, 170 N. Y. 195), equity will impress a trust upon it. In such case it will not be an answer to say that upon his death the husband left a larger personal estate than he received from his wife. A trustee may not convert trust funds to his own or another's use on the chance that upon his death his personal estate after the payment of his debts may be sufficient to reimburse the trust estate, but so long as the identical money can be traced it will retain its character as trust property, no matter what form it may take.

The deed to the defendant Schmidt was made two years before the death of the testator. She immediately entered into and has remained in possession, and no attempt was made to show that the gift to her was made in contemplation of death or to defeat the purpose of the testamentary agreement between her father and mother. To the extent that said real estate was purchased with money belonging to the estate of Elizabetha Rastetter, or in case it be shown that it was given to the defendant Schmidt in contemplation of the donor's death or to avoid in good faith the performance of the agreement made between him and Elizabetha, equity may impress a trust upon it. But as the case was not tried on that theory there must be a new trial.

The judgments should be reversed and new trial granted, with costs to abide the final award of costs.

WILLARD BARTLETT, Ch. J., HISCOCK, COLLIN, CUDDEBACH and CARDOZO, JJ., concur; WERNER, J., taking no part.

Judgment reversed, etc.

IDA A. CHEW, Appellant, v. HERBERT C. SHELDON et al.,
Respondents.

(*Court of Appeals, March 16, 1915.*)

PARTITION—WILL—TESTAMENTARY PROVISION FOR HOME AND SUPPORT OF A DAUGHTER IN HOUSE AND FARM OF TESTATOR—WHEN SUCH PROVISION OPERATES AS A RESTRICTION OR LIEN ON SALE OF FARM IN PARTITION.

1. At common law, as well as by statute, partition among tenants in common of real property is a matter of right, where they do not desire to hold and use the property in common. But it is equally well settled that equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed upon the estate by one through whom he claims.

2. Testator by his will gave all of his property to his wife and then provided that a daughter should have "a home and support in the house on the farm that I shall own at my decease, or, if after my decease, my wife shall deem it necessary to remove to some other place, my daughter shall be provided with a home and support by my wife." Testator's wife died before her husband, and after his death this action was brought by a daughter, not mentioned in the will, for the partition and sale of the farm. It is alleged in the complaint and the trial court has found as a fact that actual partition cannot be made without great prejudice to the owners. It also appears that if the farm were sold and the entire proceeds devoted to the purpose of providing a home and support for the daughter they would be inadequate, and that, therefore, testator's scheme for her support and maintenance would be defeated, whereas the farm itself now provides a home, and with the personal efforts of the daughter may be made to provide sufficient for her support. *Held*, that plaintiff and the other children of testator, as tenants in common, are entitled to a partition or sale of the farm, but that such sale should be made subject to the personal lien and claim of the daughter for whom the testamentary provision was made for her maintenance and a home on the farm with the right to the possession thereof for that purpose.

Chew v. Sheldon, 153 App. Div. 931, reversed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 30, 1912, affirming a judgment in favor of defendants

entered upon a dismissal of the complaint upon the merits by the court on trial at Special Term in an action of partition.

The facts, so far as material, are stated in the opinion.

Edmund B. Jenks and Eugene Clinton for appellant. At the time of the commencement of this action the title of the parties hereto to the lands in question was not subject to any estate therein created by their father's will; and Carrie A. Sheldon is not the owner of any "particular estate" therein under the will of said testator. (Thurber v. Chambers, 66 N. Y. 42; Lyon v. Lyon, 65 N. Y. 339; Loder v. Hatfield, 71 N. Y. 92; Jackson v. Atwater, 19 Hun, 627; Borst v. Crommie, 19 Hun, 209; Bennett v. Akin, 38 Hun, 251; Soper v. Halsey, 85 Hun, 464; Tucker v. Tucker, 122 App. Div. 358.) A gift to Carrie A. Sheldon of an estate in the lands in question would be repugnant to the absolute gift thereof to the widow. (Van Vechten v. Keator, 63 N. Y. 52; Henderson v. Merritt, 10 App. Div. 397; Noble v. Thayer, 19 App. Div. 446; Adams v. Massey, 184 N. Y. 62; Farney v. Weirich, 52 Misc. Rep. 245; Clay v. Wood, 153 N. Y. 134; Johnston v. Hughes, 187 N. Y. 446; Van Nostrand v. Moore, 52 N. Y. 12; Van Kleeck v. Dutch Ch., 20 Wend. 457; Catt v. Catt, 118 App. Div. 742.) The defendant Carrie A. Sheldon has no right in or lien upon the lands of which her father died seized, except such as she has acquired as one of her father's heirs at law, and holds in common with the plaintiff and the defendant Herbert C. Sheldon. (Bennett v. Akin, 38 Hun, 251; Borst v. Crommie, 19 Hun, 209; Soper v. Halsey, 85 Hun, 464; Loder v. Hatfield, 71 N. Y. 92; Harvey v. Olmstead, 1 N. Y. 483; Spraker v. Van Alstyne, 18 Wend. 200; Jackson v. Martin, 18 Johns. 31; Jackson v. Bull, 10 Johns. 148; Stone v. Huxford, 8 Blackf. [Ind.] 452; Thurber v. Chambers, 66 N. Y. 42; Dill v. Wisener, 23 Hun, 123.)

Jared T. Newman for Herbert C. Sheldon, respondent. The defendant Carrie A. Sheldon not only is seized of an undivided one-third of the farm, but also has a superior right to "have a home and support in the house on the farm," as provided by the second paragraph of the will. (Johnson v. Cornwall, 26 Hun, 499; 91 N. Y. 660; Kelsey v. Western, 2 N. Y. 500; Thomas on Estates by Will, 1080.) The devise of a "home and support" under the circumstances of this case in such a "particular estate" that a court of equity will deny a sale in partition without the consent of the life occupant. (Ford v. Knapp, 102 N. Y. 140; Hewlett v. Wood, 62 N. Y. 75; Matter of Denfield, 165 Mass. 265; Wusthoff v. Dracort, 3 Watts, 240; King v. Cole, 6 R. I. 584; G. P. Assn. v. Walker, 52 Md. 452; Barnes v. Kelly, 41 Atl. Rep. 772; Danvers v. Dorrity, 14 Abb. Pr. 208; O'Shaughnessy v. O'Shaughnessy, 97 N. Y. Supp. 1126; Brown v. Lutheran Church, 23 Penn. St. 495.)

Milo C. Paige for Carrie A. Sheldon, respondent. Under the provisions of the will of Anson S. Sheldon, deceased, the real estate in question is subject to Carrie A. Sheldon's rights to a home and support. (Thurber v. Chambers, 66 N. Y. 42; McGoldrick v. Bodkin, 140 App. Div. 196; Nellis v. Nellis, 99 N. Y. 505, 516.) The paramount intention of the testator was to provide a home and support for his daughter, Carrie A. Sheldon. (Weeks v. Cornwell, 104 N. Y. 347; Matter of James, 146 N. Y. 76; Leggett v. Firth, 132 N. Y. 7; Central Trust Co. v. Egleston, 185 N. Y. 23; Goodwin v. Coddington, 154 N. Y. 283; Van Nostrand v. Moore, 52 N. Y. 12; Van Vechten v. Keator, 63 N. Y. 52.) The plaintiff cannot maintain partition of the real estate in question. (Code Civ. Pro., §§ 1533, 1537; Holder v. Holder, 40 App. Div. 255; Ellerson v. Westcott, 148 N. Y. 149.)

CUDDEBACK, J.—Anson S. Sheldon died in the year 1907, leaving a last will and testament made in 1903, whereby he de-

vised all his property, both real and personal, to his wife Juliaette, and made the following provision for his daughter Carrie A. Sheldon:

"Second. My daughter Carrie shall have a home and support in the house on the farm that I shall own at my decease, or, if after my decease, my wife shall deem it necessary to remove to some other place, my daughter shall be provided with a home and support by my wife Juliaette."

At the time of making the will, the testator was the owner of a farm containing about 103 acres, and worth about \$1,800. His estate at the time of his death consisted of the farm and of personal property of the value of about \$550. His heirs at law were the plaintiff, Ida A. Chew, the defendant Herbert C. Sheldon, neither of whom is mentioned in the will, and the defendant Carrie A. Sheldon in whose favor provision for a home and support was made.

The defendant Carrie A. Sheldon was about fifty years old when her father died. She had never married but had always resided at home with her parents. The testator's other children, the plaintiff and the defendant Herbert C. Sheldon, left home when comparatively young. The testator's wife died before her husband and thereafter and until the demise of the testator the daughter Carrie resided alone with him on the farm referred to in the will. After her father's death she continued to occupy the farm as her home and had her support therefrom with the acquiescence of all the other parties to the action until April, 1909. She had no property except about three or four hundred dollars, which she had saved, and that, together with the provision in the will, were her only means of support.

The plaintiff brings this action for a sale of the farm and a division of the proceeds of the sale among the parties to the action, and for an accounting. It is alleged in the complaint, and the court has found as a fact, that the farm is so situated that actual partition thereof cannot be made without great

prejudice to the owners. The action is resisted by the defendant Carrie A. Sheldon on the ground that a sale as demanded in the complaint would be in violation of the provisions of the will giving her a home on the farm and maintenance therefrom, and the defendant Herbert C. Sheldon joins in that defense.

It is a well-settled rule that at common law, as well as by statute, partition among tenants in common of real property is a matter of right, where they do not desire to hold and use the property in common. (Smith v. Smith, 10 Paige, 470; Van Arsdale v. Drake, 2 Barb. 599; Willard v. Willard, 145 U. S. 116.) But is an equally well-settled rule that "equity will not award partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims." (Dee v. Dee, 212 Ill. 338, 354; Kepley v. Overton, 74 Ind. 448; Serena v. Moore, 69 N. J. Eq. 687; Latshaw's Appeal, 122 Penn. St. 142; Swaine v. Denby, L. R. [14 Ch. Div.] 326; Holden v. Rush, 119 App. Div. 716; Tucker v. Tucker, 122 App. Div. 308; Buschmann v. McDermott, 154 App. Div. 515; and cases cited in 30 Cyc. 185.)

It is apparent from a reading of the will that the especial objects of the testator's bounty were his wife and the daughter who had remained at home. He makes no mention of his other children who went away early in life. He gave all his property, real and personal, to his wife, but charged the real estate with the burden of providing a home and means of support for the daughter. The home was to be in the house on the farm, and the support was to come from the farm. The only way in which the daughter could be deprived of this home and means of support was by the act of the mother, who might remove from the farm, in which case she was required to provide a home and support for her daughter in some other way. The death of the mother took away the only person who could defeat the

daughter's claims upon the land. The daughter took no estate in the land by a personal interest or bequest which constituted a lien or charge thereon. (Thurber v. Chambers, 66 N. Y. 42; Borst v. Crommie, 19 Hun, 209; Kelsey v. Western, 2 N. Y. 500, 508; Kingman v. Kingman, 121 Mass. 249.)

The amount and value of the testator's estate were proved, as has been mentioned, and it is manifest that if the farm were sold and the entire proceeds devoted to the purpose of providing a home and support for the daughter, they would be entirely inadequate; whereas, the farm itself now provides a home, and with the personal exertions of the daughter it can be made to provide sufficient for her support.

A sale of the farm which carries with it and cuts off the claim of the testator's daughter Carrie to support and maintenance, will entirely defeat the scheme and intention of the testator, and the plaintiff's demand for relief to that extent should be denied.

The plaintiff argues further that the property may be sold free from the claim of the defendant Carrie A. Sheldon, upon the ground that the directions in the will for her support and maintenance are void as being repugnant to the prior devise of the farm in fee to the testator's wife. And also that the bequest in favor of the daughter lapsed with the lapse of the devise to the wife. That argument again runs counter to the manifest intention of the testator. As has been already said, the testator was desirous not only of properly caring for his wife, but of providing a home and means of support for his daughter as well, and his will should receive the most favorable construction to accomplish the purpose intended. There is nothing repugnant between the provisions of the will giving the testator's property to his wife, and charging the property in her hands with the maintenance of the daughter. Full effect can be given to every part of the instrument, and that the law requires in every case. (Matter of Title G. & T. Co., 195 N. Y. 339;

Scott v. Stebbins, 91 N. Y. 605, 615; Sherrer v. Bartlett, 45 App. Div. 135.) The bequest to the daughter of a lien on the farm was not so dependent on the devise to the wife as to lapse with the lapse of the devise. It was independent, and was binding on the farm in whosoever hands the land might come. (Thurber v. Chambers, 66 N. Y. 42, 48; Birdsall v. Hewlett, 1 Paige, 32.)

The complaint of the plaintiff, however, should not have been dismissed altogether, but judgment should have been given for a sale of the farm subject to the personal lien and claim of the defendant Carrie A. Sheldon for her maintenance and a home thereon with the right to possession of the farm for the purposes of her lien and claim. The plaintiff and her sister, the defendant Carrie, and her brother Herbert C. Sheldon, were the owners as tenants in common of the farm, and their interests as such tenants in common were subject to partition or to a sale and division of the proceeds if actual partition could not be made. (Borst v. Crommie, *supra*; Code Civ. Pro., § 1539.)

I recommend that the judgment appealed from be reversed and a new trial granted, with costs to abide the final award of costs.

WILLARD BARTLETT, Ch. J. (dissenting).—In Kingman v. Kingman (121 Mass. 249) the testator gave to his daughter “the use and improvement of so much of my house as she may need during her life, and also a privilege at the fire, which I have made for my wife, while they live together.” The Supreme Judicial Court of Massachusetts held that the daughter took an interest in the nature of an easement or servitude under this provision of her father’s will. I think that Carrie Sheldon took a similar easement or servitude under the will in the present case. As our brother CUDDEBACK has correctly said, equity will not award partition in violation of a condition or restriction imposed upon the estate by one through whom a party

claims. I think such a condition is imposed by the second paragraph of the will. Carrie was to have a home and part in the house on the farm that her father owned at his decease. The facts proved upon the trial show that she can obtain adequate support by remaining on the farm and living in the house; but that if the property is sold the income from the proceeds will not suffice to support her. Under these circumstances in order to carry out the intention of the testator and give the daughter the support which he clearly contemplated, it is essential that the farm should remain in her possession and that she should live there. Such possession on her part and residence there are inconsistent with the idea of any partition and sale of the premises during her lifetime unless such sale is made with her consent. If she has the right, as I think she has, to remain there and receive all the rents and profits to her own use as long as she lives, it is unreasonable to suppose that any bidder at a partition sale would give anything for the property except what it might be worth after the termination of the easement or servitude in her favor. This value would be so difficult to ascertain that it seems to me preferable to hold that the nature of the charge upon the estate precludes a partition during her lifetime without the daughter's consent: If this view is correct the judgment should be affirmed instead of being reversed.

HISCOCK, COLLIN, HOGAN, CARDOZO and SEABURY, JJ., concur with CUDDEBACK, J.; WILLARD BARTLETT, Ch. J., reads dissenting memorandum.

Judgment reversed, etc.

In the Matter of the Application of JOHN R. ROBERTS, Respondent, for an Order Directing the Sale of Real Property of ABBY A. PARSONS, Deceased, for the Payment of Her Debts. RAY B. PARSONS, as Administrator, Appellant.

(*Court of Appeals, March 23, 1915.*)

DECEDENT'S ESTATE—PROCEEDING TO SELL REAL ESTATE OF A DECEDENT TO PAY HIS DEBTS—JURISDICTION OF SURROGATE TO DETERMINE, IN SUCH PROCEEDINGS, THE VALIDITY OF CLAIM REJECTED BY THE ADMINISTRATOR—EQUITABLE DEFENSES TO PROCEEDING TO SELL REAL ESTATE—WHEN REAL ESTATE OF A DECEASED PARTNER LIABLE FOR DEBTS OF HIS FIRM.

1. The rejection by an administrator of a claim against an estate does not deprive the surrogate of jurisdiction to determine its validity in a proceeding by the claimant to sell the intestate's real estate for payment of debts. (*Matter of Haxtun*, 102 N. Y. 157, followed.)

2. In a proceeding to sell the real estate of a decedent to pay his debts, the existence of an equitable defense on behalf of his heirs at law may not be disregarded on the ground that the Surrogate's Court has no jurisdiction in equity. To bar the proceeding, however, the equitable defense must be one which is available against the claimant. The right on the part of the administrator to bring a suit in equity attacking the title of a third party to alleged assets of the decedent does not constitute such a defense.

3. Joint liabilities should be paid from joint property, if possible, and not until that remedy is exhausted, or resort thereto shown to be useless, can payment from the individual property be exacted, but where the proof and findings negative the existence of any firm assets, the real estate of the deceased partner may be sold for the payment of the firm debts.

Matter of Roberts, 162 App. Div. 922, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 4, 1914, which affirmed a decree of the Herkimer County Surrogate's Court directing the sale of real property of Abby A. Parsons, deceased, for the purpose of paying her debts and funeral expenses.

The facts, so far as material, are stated in the opinion.

William J. Gardinier for appellant. Under the provisions of the Code of Civil Procedure then in force this petitioner, John R. Roberts, being the holder of a disputed and rejected claim, could not compel a sale of decedent's real estate until claimant's standing as a creditor had been established in some other action or proceeding. (Matter of Pirie, 133 App. Div. 433; *Merchant v. Merchant*, 53 Hun, 638; Matter of Rider, 68 Misc. Rep. 270.) The trial of a rejected claim by the surrogate is not necessary or incidental to a proceeding to sell decedent's real estate for the payment of debts. (Matter of McDonald, 211 N. Y. 272; Matter of Martin, 211 N. Y. 328; *McNulty v. Hurd*, 72 N. Y. 518; Code Civ. Pro., § 1822; *Clark v. Scovill*, 191 N. Y. 8; *Bankers' Surety Co. v. Myers*, 146 App. Div. 867.) Should this court hold that the surrogate did have the jurisdictional power to pass upon petitioner's claim, then it would seem that it must likewise decide that such jurisdiction extended to all sides of the controversy, so as to enable it to do exact justice. (Matter of Haxtun, 102 N. Y. 160; Matter of Archer, 77 Misc. Rep. 288; Matter of Wagner, 119 N. Y. 28; Matter of Peck, 206 N. Y. 55.) If it be determined that there is copartnership personal property on hand, applicable to the payment of said indebtedness, then this proceeding must necessarily fail of itself, because one of the requirements for a decree herein is proof of the insufficiency of personalty. (Code Civ. Pro., § 2759; *Kingsland v. Murray*, 133 N. Y. 170; *Platt v. Platt*, 105 N. Y. 497; *Olyphant v. Phyfe*, 48 App. Div. 1.)

Romeyn Wormuth and D. H. O'Brien for respondent. The Surrogate's Court has jurisdiction to determine the validity of a claim of a creditor in a proceeding instituted by the creditor to dispose of the real estate of a decedent, whether such claim has been rejected by the estate or not. (Matter of Haxtun, 102 N. Y. 157; Matter of Pirie, 133 App. Div. 433, 198 N. Y. 209;

Matter of Eychner, 65 Misc. Rep. 87; Matter of Rider, 68 Misc. Rep. 271; Turner v. Amsdell, 3 Dem. 19; Heaton on Surrogates' Courts [3d ed.], 1247, § 250.) The estate of a person jointly liable upon contract with others is not discharged by his death, and an action may be brought against his personal representatives by alleging and proving that the debt cannot be collected from the surviving joint debtor. (Code Civ. Pro., § 758; Potts v. Dounce, 173 N. Y. 335; Barnes v. Brown, 130 N. Y. 372; Norment v. Wittman, 157 App. Div. 708; Seligman v. Friedlander, 199 N. Y. 372; Leggat v. Leggat, 79 App. Div. 141, 176 N. Y. 590.) John E. Roberts, as sole surviving partner of the firm of Parsons & Roberts, was the legal owner of the assets of said firm, subject to an accounting with the personal representatives of Abby A. Parsons, deceased, and had a right to prefer creditors and to sell and transfer the property of said firm. (Costello v. Costello, 209 N. Y. 252; Nehrboss v. Bliss, 88 N. Y. 600; Reinhardt v. Reinhardt, 134 App. Div. 440; Williams v. Whedon, 109 N. Y. 333; Dillenbeck v. Digert, 97 N. Y. 303; Bank of Monongahela v. Western, 159 N. Y. 211.) The Surrogate's Court has only such jurisdiction and powers as have been specially conferred by statute. (Matter of Martin, 211 N. Y. 328.)

WILLARD BARTLETT, Ch. J.— From 1899 to 1904 one Riley Parsons, the husband of Abby A. Parsons, and John E. Roberts were copartners at Old Forge in Herkimer county where they carried on the business of boat building under the firm name of Parsons & Roberts. In February, 1903, the father of John E. Roberts loaned the firm \$1,200, having previously advanced \$300 to the copartnership, making a total loan of \$1,500, all of which was actually used in the building and equipment of the firm's boat shop and in payment for machinery used in the business. The firm thereupon executed to the lender on February 18, 1903, a promissory note for \$1,500, payable six months

after date. In September, 1904, Riley Parsons, one of the partners, died and his widow, Abby A. Parsons, took his place as a partner in the firm, succeeding to the share and interest of her husband therein. On February 18, 1906, the following note was substituted in place of the original:

"\$1,500 OLD FORGE, NEW YORK, Feb. 18, 1906.
"Three months after date we promise to pay to the order of John R. Roberts, Fifteen Hundred and no/100 Dollars, at _____, for value received with interest.
" [Signed] J. EATON ROBERTS.
" ABBY A. PARSONS."

This note is the basis of the claim in controversy. The payee, John R. Roberts, is the father of J. Eaton Roberts, one of the makers.

Abby A. Parsons died intestate on May 30th, 1908, leaving personal property not exceeding one hundred dollars in value and two parcels of real estate, situated in the town of Webb, in Herkimer county. Her partner, J. Eaton Roberts, the other maker of the note, is also dead; and John R. Roberts, his father and the payee of the note, instituted this proceeding before the surrogate of Herkimer county upon a petition setting out the execution and delivery of the note and the death of the makers, and alleging that the personal estate of Abby A. Parsons was inadequate to pay the indebtedness represented by the note. He, therefore, prayed for a decree directing the sale of so much of the decedent's real property as might be necessary for the payment of her debts and funeral expenses, according to the practice then provided for in title 5 of chapter 18 of the Code of Civil Procedure (sections 2749 and 2801a, inclusive). The procedure in Surrogates' Courts has been extensively changed by the revision of that portion of the Code relating thereto in 1914; but there is no amendment affecting the present proceeding, which must be determined according to the provisions of the

statute as they existed prior to the first day of September, 1914, when the revision of that year took effect.

Ray B. Parsons, a son and heir at law of the decedent, and also administrator of her estate, appeared in behalf of himself and three other children and heirs at law, and interposed a defense, the substance of which was that inasmuch as the note was given wholly in the partnership business, and the proceeds thereof wholly used therein, and inasmuch as there were sufficient assets of the copartnership to satisfy the petitioner's claim upon the note, he should exhaust his remedies against the firm property before being permitted to resort to the real estate of the decedent for the payment of his debt. It appeared that the claim upon the note had been duly and seasonably rejected by the administrator, who insisted that his rejection deprived the surrogate of jurisdiction to entertain this proceeding until the claimant's standing as a creditor had been elsewhere established.

In the memorandum filed by the surrogate this last objection is first considered. The surrogate says it would seem the rule should be that a claim on contract like this ought to be established by a trial but that the authorities appeared to sustain the proposition that it could be established in the first instance before the surrogate in a statutory proceeding to sell the real estate of the decedent. He, therefore, reluctantly followed the precedents to this effect. As to the equities which might exist between the decedent's estate and the estate of her partner, he said he was unable to find evidence upon which those equities could be enforced against the claimant. He, therefore, allowed the claim and made the decree of sale which has been affirmed by the Appellate Division.

The Appellate Division wrote no opinion, but undertook to state the proposition of law upon which it acted in the body of the order of affirmance, from which I quote:

"Held: That assuming appellants to have an equitable right to require the joint property of the makers of the claimant's

note to be first applied toward the payment of the joint debt of the makers of the note before resort is had to the individual property of the joint makers, still such relief can only be had in a court having equitable jurisdiction. This the surrogate did not have. Appellant's remedy, if any, is by an equitable action."

The learned surrogate was clearly right in holding that he had jurisdiction notwithstanding the fact that the claim had been absolutely rejected by the administrator. (*Matter of Haxtun*, 102 N. Y. 157.) On the other hand, it is clear that the defense was one which the heirs were entitled to set up. The Code of Civil Procedure provided (former section 2755) that an heir or devisee might interpose any defense to the whole or any part of a debt due or unpaid represented as existing against the decedent. This permitted the interposition of an equitable as well as a legal defense. The findings made by the surrogate at the request of the appellant show the note in question was a partnership note given to secure the repayment of money loaned to the partnership and used in the partnership business. The appellant, therefore, invoked the application of the rule that payment cannot be compelled out of the individual estate of one partner until it is made to appear that the debt cannot be collected out of the joint property or that the estate of the other partner is insolvent. "The fundamental principle upon which the partnership relation is founded is that of a joint adventure, with joint ownership of assets and only joint liability for debts, unless the property held jointly is insufficient to pay the firm debts, or it appears that there can be no effective remedy without resort to individual property." (*Seligman v. Friedlander*, 199 N. Y. 373, 376, and cases there cited.) After thus stating the rule, Judge VANN added that for time out of mind it had been the theory of the law that the joint liabilities should be paid from the joint property, if possible, and not until that remedy was exhausted, or resort thereto

shown to be useless, could payment from the individual property be exacted.

Accordingly, if the administratrix had proved that there remained property of the firm of Parsons & Roberts applicable to the payment of the copartnership debts, including this note in controversy, it would have been the duty of the surrogate to dismiss the present proceeding, or stay the same until the determination of an action to compel payment of the note out of such firm assets. (See Matter of Randall, 152 N. Y. 508, 520.) The proof, however, negatived the existence of any firm assets and so do the findings of the surrogate. As has already been pointed out, Abby A. Parsons died before John E. Roberts. After her death John E. Roberts, the surviving partner, continued in the occupation and management of the boat-shop business and property down to the time of his death, which occurred on June 25th, 1910. There was no formal partnership accounting or settlement of the affairs of the firm, but after the death of Mrs. Parsons writings were executed by her heirs at law and next of kin and delivered to John E. Roberts, the surviving partner, purporting to convey to him their right and interest in and to the partnership property, whereby he on the other hand assumed and agreed to pay the debts and obligations of the firm, including the \$1,500 indebtedness represented by the note to his father. Subsequently, however, and by deeds executed in 1909 and 1910, and a bill of sale dated in 1910, John E. Roberts, the surviving partner, assumed to convey the boat shop and its contents to one Frank J. C. Steber, who was the cashier of a national bank. John E. Roberts died insolvent and wholly unable to pay his debts. Although the surrogate found that no money consideration passed from Mr. Steber at the time of the execution and delivery of the deeds and bill of sale, he refused to find that Mr. Steber was not a *bona fide* purchaser or holder of said partnership real and personal property for value, and the testimony indicates that the true con-

sideration for the transfer was lumber previously purchased by Mr. Steber and furnished from time to time to John E. Roberts for use in the boat-building business.

Mr. Steber is in nowise a party to the present proceeding. He has acquired the legal title to the partnership assets. No firm property remains applicable to the payment of the petitioner's claim and the estate of the other partner is insolvent. The possibility that the transfer to Mr. Steber may hereafter be invalidated by means of a suit in equity instituted for that purpose is not a sufficient reason for denying relief to the petitioner. If this proceeding results in a liquidation of the note the parties whose lands are sold will be entitled to recover the amount thereof out of any property which may hereafter be adjudicated to be assets of the partnership, and will thus be protected against loss.

It is because of the erroneous inference which might be drawn from the phraseology of the order of the Appellate Division that this opinion has been written. It applies, if it does not assert, that in a proceeding to sell the real estate of a decedent to pay the debts the existence of an equitable defense may be wholly disregarded because the Surrogate's Court has no jurisdiction in equity. Such is not the law. To bar the proceeding, however, the equitable defense must be one which is available against the claimant. Here there would have been such a defense if the existence of available firm assets had been proved; but on the contrary the evidence was that the legal title to these had passed to a third party. The right on the part of the administrator to bring a suit in equity attacking the title of that third party does not constitute a defense against this claimant, who is not shown to have had anything to do with the transfer. Hence the order below was right, although the reasons assigned for making it may be misleading.

The courts cannot insist too strongly upon accurate practice in cases of this character. "The title to real estate upon the

death of the owner vests immediately in his heirs and devisees, and at common law they took it free from his general debts. It can be taken for the payment of debts now only by virtue of statutes, and the statutory provisions must be strictly pursued in order to justify its sale." (Kingsland v. Murray, 133 N. Y. 170, 174.)

The order appealed from should be affirmed, with costs.

HISCOCK, CHASE, COLLIN, MILLER, CARDOZO and SEABURY, JJ., concur.

Order affirmed.

In the Matter of the Application for the Construction of the Will of WILLIAM W. PHIPPS, Deceased. FRANK W. PHIPPS, Appellant; CLARA E. PHIPPS, Respondent.

(Court of Appeals, March 23, 1915.)

WILL—CONSTRUCTION OF DEVISE—EVIDENCE—WHEN PAROL EVIDENCE WILL BE RECEIVED TO EXPLAIN WHAT LANDS ARE INCLUDED IN THE DEVISE.

1. Generally speaking a will bears its own testimony, but where the description of the property sought to be devised is so uncertain as to leave in doubt what was the subject of disposition, parol evidence is to be received and considered. Such evidence is received, not to contradict the provisions of the will, but, when it is doubtful what lands are included in a devise, to explain to what particular pieces of land the language of the will referred.

2. The second clause of testator's will provided that in case his wife survived him she should have the "life use of my Homestead Farm containing about thirty acres of land, together with the Mosher land, so-called, forming a part of said Homestead Farm." On examination of the will and of the evidence given on the trial, *held*, that the Surrogate's Court correctly held that the term "Homestead Farm" as used in the will refers to the dwelling house where the testator and his family lived, with its appurtenances and outbuildings and the land used in connection therewith, and does not include other lands of the testator.

Matter of Phipps, 166 App. Div. —, reversed.

APPEAL from an order of the Appellant Division of the Supreme Court in the fourth judicial department, entered January 29, 1915, which modified and affirmed as modified a decree of the Orleans County Surrogate's Court construing the will of William W. Phipps, deceased.

The facts, so far as material, are stated in the opinion.

Isaac S. Signor for appellant. The words "Homestead Farm" as contained in the will were properly construed by the surrogate. (*Rogers v. Wheeler*, 22 Wend. 148; *Matter of Wheeler*, 32 App. Div. 187; *Matter of Hastings*, 6 Dem. 320.)

Sanford T. Church for respondent. The evidence introduced by petitioner fails to establish an intent on the part of testator to give to his wife any smaller quantity of land than the whole of the farm used together and occupied by him as a home at the time of the execution of the will in question. (*Matter of Love*, 149 App. Div. 347, 206 N. Y. 671; *Underhill v. Vandervort*, 56 N. Y. 242; *Jackson v. Beringer*, 15 Johns. 470; *Kendall v. Miller*, 47 How. Pr. 446; *Kennedy v. Kennedy*, 105 Ill. 350.) The intent of the testator as gathered from the whole instrument must control. (*Redfield's Surr. Pr.* 225; *Wager v. Wager*, 96 N. Y. 164.)

SEABURY, J.— This proceeding was commenced in the Surrogate's Court in Orleans county on the petition of the only son of the testator, who is the appellant herein, for a construction of the last will and testament of his father, William W. Phipps, deceased. The appellant is the residuary legatee and devisee under the will. The respondent is the widow of the testator and the stepmother of the petitioner. The controversy involves the construction of the second clause of the will which reads as follows:

"In case my wife Clara E. Phipps shall survive me, then in such event, I give, devise and bequeath to my said wife, Clara E.

Phipps, the life use of my Homestead Farm containing about thirty acres of land, together with the Mosher land, so-called, forming a part of said Homestead Farm, she to have the use, occupation, possession, enjoyment and control, and the rents, issue and profits thereof for and during her natural life, and at her death the same shall pass to and become the property of residuary legatee and devisee hereinafter named to whom subject to the life estate hereby given to my said wife Clara E. Phipps, I hereby give, devise and bequeath the same."

At the time the testator made his will and at his death, he owned four pieces of real estate in the town of Albion contiguous to one another. He owned no other land near these parcels. The four parcels which he owned consisted of the home farm which contained 25.68 acres, the so-called Mosher land, which contained 4.23 acres, the tenant place, which contained 7.81 acres, and a lane two rods wide, which was situated between the home farm and the Mosher land on the west and the tenant place on the east. The question in dispute is whether the words used in the second clause of the will, "my Homestead Farm containing about thirty acres of land, together with the Mosher land, so-called, forming a part of said Homestead Farm," include the tenant place containing 7.81 acres. If these words do include the tenant place then the tenant place passes to the testator's widow under the second clause of the will. If they do not include the tenant place then the tenant place is not within the second clause of the will and falls into the residuary estate of the testator and passes to his son, the appellant herein. The surrogate held that this clause of the will did not include the tenant place. The Appellate Division modified the decree of the surrogate so as to provide that this clause of the will did include the tenant place. The order of the Appellate Division being silent as to the grounds of its decision modifying the decree of the surrogate, the presumption is that it was made solely as a matter of law. In view, therefore, of the form of the order

appealed from, the question before us is whether there was any evidence to sustain the finding of the surrogate. If we look only to the will itself, we find nothing that indicates that the testator intended to include the tenant place in the devise of "my Homestead Farm containing about thirty acres of land, together with the Mosher land, so called, forming a part of said Homestead Farm." The term "Homestead Farm" as used in the will refers to the dwelling house where the testator and his family lived, with its appurtenances and outbuildings and the land used in connection therewith, and not to the tenant farm. (Smith v. Dennis, 163 Ill. 631; McKeough's Estate v. McKeough, 69 Vt. 34.) Generally speaking the testament bears its own testimony, but where the description of the property sought to be devised is so uncertain as to leave in doubt what was the subject of disposition, parol evidence is to be received and considered. Such evidence is received not to contradict the provisions of the will, but to explain to what particular pieces of land the language of the will referred. The circumstances proved in this case support the conclusion that the testator did not intend to devise the tenant place to his wife under the second clause of his will. The will makes it clear that the Mosher land formed a part of the homestead farm, and that the testator estimated the homestead farm as "containing about thirty acres of land." The home farm itself contained 25.68 acres while the Mosher land contained 4.23 acres and together 29.91 acres or nearly thirty acres of land. If the tenant land is included the acreage devised would be 38.69 acres instead of thirty acres.

It appears that the testator for many years kept books of account in which he carefully inventoried at the end of each year all his property. He inventoried the home farm and the Mosher land together and included them as a single farm containing thirty acres. Thus in 1903, 1904 and 1905 he inventoried these two parcels of land by the use of the following words: "Thirty acres Home." In 1906 he purchased the land

which is referred to as the tenant place, and after that for eight years he continued to inventory the home farm and Mosher land as one parcel, designating it as "Thirty acres Home," and the tenant place during all this period was not included within the home farm but was separately inventoried and valued as "Tenant house and $7\frac{1}{2}$ acres," or "Tenant house 7.80 acres" or "Tenant 7.8 acres." The fact that the testator specifically mentioned in the second clause of his will the Mosher land in addition to the home farm and referred to both parcels as "forming a part of said Homestead Farm" indicates, in the absence of any circumstance to the contrary, that if he had intended to include the tenant place as a part of the "said Homestead Farm" he would also have referred specifically to that parcel of land. If he intended by the words "forming part of my said Homestead Farm" to include all lands owned in the vicinity, it was unnecessary for him to have said "and together with the Mosher land, so-called." If he did not intend to include all lands in the vicinity of the home farm there is no basis for the claim that he intended to include the tenant place. In view of the fact that the home farm and the Mosher land together contained nearly thirty acres, that these two parcels adjoined one another and were always used together as a part of the same farm and were inventoried by the testator as one farm, it might have been inferred that the testator intended to include the Mosher land even if he had made no special reference to it in his will. The testator did not leave this matter open to doubt and conjecture, but in terms included the Mosher land as a part of the home farm. The special care which he took to clearly express his meaning in this respect indicates that if he had intended to include the tenant place he would have used language appropriate to express that intention.

The respondent argues that the whole property including the tenant place was one farm and that to ascertain what was intended to be included in the "thirty acres" referred to in the

second clause of the will, we should exclude the Mosher land and estimate the acreage in the tenant place and the home farm which together contained thirty-three acres and that such property would fall within the words "about thirty acres of land." The vice of this argument lies in the fact that the language employed by the testator makes it clear that he regarded the Mosher land as "forming a part of said Homestead Farm" and that he estimated the "Homestead Farm" as "containing about thirty acres of land." Thus the language he used excludes all reference to the tenant place. The interpretation placed upon this clause of the will by the surrogate was correct and the order of the Appellate Division modifying the decree of the surrogate should be reversed and the decree of the surrogate affirmed, with costs to the appellant in the Appellate Division and in this court.

WILLARD BARTLETT, Ch. J., HISCOCK, CHASE, COLLIN, MILLER and CARDOZO, JJ., concur.

Order reversed, etc.

In the Matter of the Application of WILLIAM J. REED, Respondent, for the Sale of Real Estate of HENRY M. BAILEY, Deceased, for Payment of His Debts. FRANCES H. STODDARD, as Administratrix, et al., Appellants.

(Court of Appeals, March 23, 1915.)

DECEDENT'S ESTATE—PROCEEDING TO MORTGAGE REAL ESTATE OF DECEDENT—TO GIVE COURT JURISDICTION OF SUCH PROCEEDING NOTICE TO ALL CREDITORS AND PARTIES DESCRIBED IN THE STATUTE (CODE CIV. PRO., §§ 2523, 2754) MUST BE GIVEN AS PRESCRIBED BY LAW.

It is the function of the administrators in a proceeding to mortgage the real estate of their testator to safeguard the rights of creditors. Notice to all parties described in the statute in such a proceeding is a jurisdictional requirement and may not be dispensed with. The remedy is statutory, and the statute must be strictly followed. (Code Civ. Pro. [1911], §§ 2523, 2754.)

Matter of Reed, 159 App. Div. 931, reversed.

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 23, 1913, which affirmed a decree of the Warren County Surrogate's Court directing the administrators of Henry M. Bailey, deceased, to mortgage his real estate in order to pay an alleged debt.

The facts, so far as material, are stated in the opinion.

Charles H. Stoddard for appellants. The petition is radically and fatally defective in that it is signed, not by the petitioner, but by Beecher S. Clothier, as attorney, and is verified by Beecher S. Clothier, and not by petitioner. (*Schneider v. Leizman*, 57 Hun, 561; *Ellwood v. Northrup*, 106 N. Y. 172; *Atkins v. Kinnan*, 20 Wend. 241; *Bethell v. Torrey*, 65 N. Y. 294; *Stilwell v. Swarthout*, 81 N. Y. 109.) The surrogate did not obtain jurisdiction over the persons necessary to make his decree effective. (*Jenkins v. Young*, 35 Hun, 569; *Kammerer v. Ziegler*, 1 Dem. 177; *Matter of Georgi*, 44 App. Div. 180; *Stilwell v. Swarthout*, 81 N. Y. 109.) The surrogate did not obtain jurisdiction because the citation was not served by publication. (*Yates v. Lansing*, 9 Johns. 395; *Smith v. Foote*, 12 Wend. 9; *Denning v. Corwin*, 11 Wend. 648.)

Beecher S. Clothier for respondent. The surrogate had jurisdiction, and obtained jurisdiction of the subject-matter and the parties. (*James v. Adams*, 22 How. Pr. 409; *Harrison v. Clark*, 20 Hun, 404; 87 N. Y. 572; *Matter of Finn*, 8 Civ. Pro. Rep. 206; *Matter of Delaplaine*, 12 Civ. Pro. Rep. 35; Code Civ. Pro. § 2481, subd. 2; *Van Deusen v. Sweet*, 51 N. Y. 378; *Matter of German Bank*, 39 Hun, 181; *Merchant v. Merchant*, 25 N. Y. S. R. 268; *Coley v. Tallman*, 107 App. Div. 445; *Maher v. Eckert*, 115 App. Div. 580; *Block v. Block*, 131 App. Div. 850.) The attorney for the petitioner had authority to sign and verify the petition. (*Morehouse v. Hutchins*, 2 Dem. 429.)

CARDOZO, J.— This is a proceeding by a creditor for the sale or mortgage of the real property of a decedent. It was begun in 1911, and is, therefore, governed by the statutes in force before the recent revision of practice in the Surrogates' Courts. (L. 1914, ch. 443, sections 2701, 2705, 2771.) The creditors' claim is for \$100 and interest. The form of his petition is criticised, but we think its averments are sufficient. We think also that the verification of the petition by the attorney is sanctioned by the statute. (Code Civ. Pro. section 2534, now section 2525.) But the omission to serve the citation upon the creditors makes it impossible for us to sustain the order until that requirement has been satisfied. The statute (previous to the recent revision) provided: "Unless the executor or administrator has caused to be published, as prescribed by law, a notice requiring creditors to present their claims, and the time for the presentation thereof, pursuant to the notice, has elapsed, the citation must be directed, generally to all other creditors of the decedent, as well as the creditors named." (Code Civ. Pro. section 2754.) A citation thus addressed to unknown creditors as a class must be served by publication. (Code Civ. Pro. section 2523.) The petition does not allege that a notice to present claims has been published, and the evidence is that it has not been published. The statute, therefore, required that the citation be addressed to the creditors generally. The petitioner obtained such a citation, but did not serve it. He served the heirs and the administrators only. We think there can be no mortgage of the estate until the omission has been made good.

It is true the petition alleges that there are no creditors other than the petitioner. It is also true that the heirs and one of the administrators have answered, and have not traversed this averment. But until notice to present claims has been published, the creditors must remain uncertain. They are not to be cut off because the heirs and the administrators have not heard of them. The very purpose of the statute was to give

assurance that all creditors, unknown as well as known, should have notice of the proceeding.

It is argued that the heirs are not aggrieved by the omission to publish the citation against creditors, and cannot take advantage of the omission, to gain a reversal of the order. Even if that argument were sound, it would not apply to the administrators, one of whom has joined in this appeal. It is the function of the administrators in such a proceeding to safeguard the rights of creditors. (*Jenkins v. Young*, 35 Hun, 569, 572.) They cannot do this unless all creditors, unknown as well as known, are brought before the court. Notice to all parties described in the statute is a jurisdictional requirement. It may not be dispensed with because in a particular instance it may seem profitless. We cannot know in this case whether it will be profitless or not. We do know that if other creditors shall unexpectedly appear, they will have an equal right with the petitioner to share in the proceeds of a sale or mortgage of the estate. The remedy is statutory, and the statute must be strictly followed. (*Matter of Roberts*, opinion of WILLARD BARTLETT, Ch. J., 214 N. Y. 369.)

The order should be reversed, and the matter remitted to the Surrogate's Court, to the end that service of the citation may be made upon the creditors. The proceedings prior to the date of the surrogate's decision may stand, however, in full force and effect as against all parties heretofore served with the citation; and the costs in the Appellate Division and in this court will abide the final award of costs to be made by the surrogate.

WILLARD BARTLETT, Ch. J., HISCOCK, CHASE, COLLIN,
MILLER and SEABURY, JJ., concur.

Order reversed, etc.

In the Matter of the Accounting of JOSEPH J. HEARNS et al.,
as Executors of STEWART BARR, Deceased, Respondents.
BEATRIX H. BARR et al., Appellants; MABEL V. BARR et al.,
Respondents.

(Court of Appeals, April 13, 1915.)

PARTNERSHIP—DECEDENT'S ESTATE—CONSTRUCTION OF AGREEMENT AS TO OWNERSHIP OF MEMBERSHIP IN STOCK EXCHANGE PURCHASED WITH PARTNERSHIP ASSETS IN NAME OF DECEDENT—JURISDICTION OF SURROGATE TO CHARGE EXECUTORS WITH LOSS CAUSED BY DELAY IN SALE OF MEMBERSHIP IN STOCK EXCHANGE.

The testator and one of the defendants, who is also one of his executors, were copartners in the stock brokerage business. The firm owned a membership in the Stock Exchange, which was purchased with partnership assets but which stood in the name of the testator. The partnership agreement provided that in case of the death of the testator this membership should be sold at once by his legal representatives and the proceeds paid in full to the survivor as liquidating partner, who should wind up the business of the partnership and pay to the estate of the decedent the share of the profits and of capital to which it might be entitled; testator's will also directed this to be done. The surviving partner and another, as executors, never disposed of the exchange membership, but on their accounting embodied therein a statement of the partnership business showing that there had been a liquidation of the partnership assets other than the Stock Exchange membership and that decedent's interest therein was charged to them at its appraised value. *Held*, that the legal title to the membership in the Exchange was in testator and after his death in his legal representatives, and the equitable title thereto in the partnership and after testator's death in his partner as survivor, and that under the account filed by them the surrogate had jurisdiction to charge the executors with any loss to the estate arising from failure to perform their duty and that they were both properly charged with the value of the membership as of the time when it should have been sold.

Matter of Hearn, 163 App. Div. 897, reversed.

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered May 21, 1914, which reversed a decree of the Kings County Surro-

gate's Court settling the accounts of the executors of Stewart Barr, deceased, in so far as such decree purports to deal with the membership of said decedent in the New York Stock Exchange.

The facts, so far as material, are stated in the opinion.

Alexander S. Bacon for appellants. The executors, and not the liquidating partner, are responsible for the Stock Exchange membership not being sold. (*Binger Co. v. Plumberg*, 134 N. Y. Supp. 115; *Hirsch v. Amin*, 28 Misc. Rep. 228; *Lewis v. Hojer*, 16 N. Y. Supp. 534; *Walbridge v. Brooklyn Trust Co.*, 143 App. Div. 502; *Fairchild v. Fairchild*, 64 N. Y. 471; *Darrow v. Calkins*, 154 N. Y. 503; *Gilmore v. Ham*, 142 N. Y. 1; *Clausen v. Puvogel*, 114 App. Div. 445.)

I. M. Dittenhoefer for respondents. The surrogate erred in charging the accounting executors with the value of the membership in the New York Stock Exchange, for the reason that neither the membership nor the proceeds realized therefrom vested in the executors, and they were not liable to account therefor. (*Estate of Hoppock*, 1 Monthly L. B. 32; *Thomson v. Thomson*, 1 Bradf. 24; *Camp v. Fraser*, 4 Dem. 212; *Betts v. June*, 51 N. Y. 274; *Sweet v. Taylor*, 36 Hun, 256; *Williams v. Wheldon*, 109 N. Y. 333; *Wilson v. Internat. Bank*, 125 App. Div. 568; *Secor v. Tradesmen's Nat. Bank*, 92 App. Div. 294; *Preston v. Fitch*, 137 N. Y. 41.)

CHASE, J.— This appeal is in a proceeding commenced in the Surrogate's Court for an accounting by the executors of the decedent. The testator whose estate is the subject of the accounting was at the time of his death one of the partners composing the firm of Barr & Hearn, engaged in the stock brokerage business.

The testator, Stewart Barr, and Joseph J. Hearn entered into a partnership agreement on the 12th day of January, 1905, which was re-written and re-stated on the 13th day of February, 1906, and was in force when Barr died. The agreement as re-stated provides that the membership in the New York Stock Exchange standing in the name of Stewart Barr was purchased out of partnership assets at a cost of \$79,010, and is part of the common capital of the partnership. The agreement also, among other things, provides: "If the said Stewart Barr of the first part shall die before the expiration of said copartnership term the said membership in the New York Stock Exchange shall at once be sold by his legal representatives and the proceeds shall at once be paid in full to the party of the second part as liquidating partner, and the party of the second part shall thereupon as rapidly as in his discretion he may deem it advisable wind up the business of said copartnership and pay to the representatives of the party of the first part the share of profits and of capital to which the estate of the party of the first part is entitled as shown by the copartnership books, and the legal representatives of the party of the first part for the purpose only of verifying the accuracy of said liquidation shall have free access to the said copartnership books. * * *" The testator's interest in the partnership was four-ninths thereof and Joseph J. Hearn's interest therein was five-ninths thereof, but each agreed to share equally with the other in any profit or loss arising from the purchase and sale of the Stock Exchange membership.

The said Stewart Barr after entering into said partnership agreement made his will and he therein provided:

"The membership in the New York Stock Exchange standing in my name was purchased with funds taken from the capital of the firm of Barr and Hearn, which firm is composed of Joseph J. Hearn and myself, the cost of said membership was \$79,010, as will appear on the copartnership books of said firm

and the dues and assessments relating to said membership have been and are being paid by the said firm. Under the partnership agreements into which I have entered with the said Joseph J. Hearns I have agreed to share equally with said Hearns in any profit or loss accruing or incurred from the sale of said membership, and that in the event of my death prior to the expiration of the term of said copartnership there shall be paid to said Hearns from my estate one-half of any gratuity paid to my widow or next of kin by the said stock exchange. I do hereby direct my executors to sell the said membership in said stock exchange as soon after my death as possible, and if my partnership agreement with said Hearns or any renewal thereof is then in force to at once pay the entire proceeds of such sale to my said partner to the end that while liquidating the said copartnership business he may have custody of the entire capital of said firm and accrued profits, and thereafter account to my executors for my share therein according to the terms of the copartnership agreement then in force * * *."

By his will Barr made his partner Hearns and Charles Martin Camp, his attorney, and also the attorney of the partnership, executors of his will.

The legal title to the membership in the Stock Exchange was in Barr and after his death in his legal representatives and the equitable title thereto in the partnership and after such death in Hearns as the surviving member thereof. Under the partnership agreement and pursuant to the terms of the will it was the duty of the executors as Barr's legal representatives to sell the membership in the Stock Exchange without delay and to pay and dispose of the proceeds thereof as provided by the terms of said partnership agreement and said will. The duty devolving upon the executors was not a mere nominal one, but a well-defined, positive and active duty. They are responsible, not alone to the surviving and liquidating partner, but under the circumstances disclosed upon this appeal, to those interested in

the estate of Stewart Barr for the faithful discharge of their duties under the will in connection with the Stock Exchange membership.

Stewart Barr died December 20, 1909, and his will was admitted to probate and letters testamentary were issued to Hearn, his surviving partner, and Camp, his attorney, as executors, on the 11th day of January, 1910. Hearn decided to continue in the business that had theretofore been conducted by the partnership of Barr & Hearn, and for that purpose it was necessary, or at least desirable, for him to obtain a membership in the Stock Exchange. He consulted the secretary of the exchange in regard to the purchase of a membership and of transferring to himself individually the membership that had theretofore been held for the partnership in the individual name of the deceased partner, Barr. He was told by the secretary of the exchange that the rules of the exchange would not permit the transfer of a membership from an executor as such to himself individually, and that he would have to purchase a membership of a stranger; whereupon and on December 24, 1909, he agreed to purchase a membership of a stranger, and two days after the probate of said will the seat so purchased was transferred to Hearn and he paid therefor \$93,000.

On the same day he and Camp, as executors, gave to the secretary of the exchange a written order to sell a membership at \$95,000. The price fixed by them for the membership was \$1,000 more than any membership had ever sold during the history of the exchange and \$2,000 more than the sum at which he, Hearn, purchased the membership for himself that was transferred to him that day.

The membership in Barr's name has not been sold. There was never a sale of a membership after January 11, 1910, for an amount exceeding \$93,000 and sales for that amount did not continue except for a few days and the price thereafter continued to decline with but slight variations. A sale was made

for \$82,000 within less than sixty days after the probate of testator's will, and for \$59,000 in March, 1912, and the market value for such membership at the time of the trial herein was much less than any of the amounts stated. The surrogate found:

"3. Said executors took no adequate steps to dispose of said stock exchange membership within sixty days after January 11, 1910 (the date on which letters testamentary were issued to them), and said Stock Exchange membership has not yet been sold.

"4. That the value of said Stock Exchange membership at all times within the said period of sixty days after January 11, 1910, and the sum for which it should and could have been sold during that period was \$80,000."

The decree charged said executors with \$80,000, the value fixed by the surrogate for said membership as of the time when it should have been sold by the executors. The Appellate Division reversed the decree of the Surrogate's Court holding that the equitable title to the membership in the Stock Exchange was in the surviving or liquidating partner and that he alone was responsible for any failure to dispose of the membership in accordance with the partnership agreement, and that the Surrogate's Court had no jurisdiction to determine the question of the responsibility of such surviving partner by reason of the alleged negligence in the disposition of said seat.

The order of the Appellate Division did not reverse any of the findings made by the Surrogate's Court, nor does it contain any new findings of fact. The findings, therefore, remain in full effect, and must be considered in connection with the pleadings in that court. (*Jacobson v. Brooklyn Lumber Co.*, 184 N. Y. 152.)

The written petition of the executors for an accounting herein was accompanied by their account as provided by section 2728 of the Code of Civil Procedure as it existed at the time of filing

such petition and account. Such petition and account accompanying the same together with the objections constituting the answer to the petition and account are the pleadings in this proceeding. (Matter of Sloane, 135 App. Div. 703; Matter of Woodward, 69 App. Div. 286; Matter of Heuser, 87 Hun, 262.)

It is stated among other things in the account of the executors that the membership in the Stock Exchange was not sold because of "the desire of the surviving partner that the seat be not sold at the prices that have (had) prevailed since the testator's death." The account which is the joint account of Hearn and of Camp as executors also contains a statement by them as such of the items of receipts by Hearn as such surviving and liquidating partner and of his disbursements as such together with a statement of the adjustment of the personal accounts of the partners with the partnership.

It also appears by such account that the partnership property was appraised in separate items and that the interest of the estate in the membership in the Stock Exchange as a separate item of partnership property was charged to the executors in the account as appraised. The remaining or undisposed of assets of the partnership and each item thereof are stated in a schedule at the conclusion of the account as follows:

"The balance of capital with which we charge ourselves as shown by summary statement is at appraised values as follows: * * *

“ New York Stock Exchange Membership carried on the books of the firm at cost, \$79,010 —	
4/9ths	\$35,115 56
In apparent profits (which partnership agree- ment provided should be shared equally):	
Appraised value —	
December 20, 1909	\$93,000
Carried at cost	79,010
	\$13,990 1/2 = 6,995 00
“ 4/9ths American Smelters Common Ap- praised value \$10,000	
	4,888 89
“ 4/9ths Claim against S. J. Baxter, \$807.04 . .	
	358 68
	\$46,958 13”

In corroboration of the account, which assumes that there has been a complete liquidation of the partnership at least so far as creditors and so far as an adjustment between the partners is concerned, it appears from the testimony of Hearn's given on the trial that at the time he first talked with the secretary of the Stock Exchange about transferring to himself the membership of Barr, and also at the time when the offer was made in writing by the executors to sell the membership for \$95,000, that all of the indebtedness of the partnership of Barr & Hearn's had been paid, and that all of the business of the partnership had been actually liquidated, excepting, of course, the membership in the Stock Exchange, the legal title to which was in the executors.

If the executor, Hearn's, had been the sale executor of the testator's estate, as well as the surviving partner, he could have accounted as such surviving partner in connection with his account as executor. (Matter of Laney, 50 Hun, 15; affd., 119 N. Y. 607; Hannahs v. Hannahs, 68 N. Y. 610.) It has been

held to be the duty of a surviving partner who is also an executor, to account in the Surrogate's Court. (Matter of Dummett, 38 Misc. Rep. 477; Matter of Mertens, 39 Misc. Rep. 512.) The duty of selling the membership in the Stock Exchange rested upon Camp as executor to the same extent that it rested upon Hearn as executor. It is clear from the account that the executors, and each of them, not only accepted such duty, but that they intended by the account to submit to the Surrogate's Court the account of Hearn as surviving partner mingled with and as a part of their account as such executors.

The surviving partner as such could not sell the membership in the Stock Exchange. He is only answerable under the agreement and under the will for the proceeds of the membership after the same is sold. If an effort is hereafter made as is suggested by the Appellate Division to hold the surviving partner as such for the loss arising by reason of the delay in selling the membership he will doubtless insist that as surviving partner he never had the proceeds of the sale of such membership. The executors as such were trustees for the benefit of the partnership and the persons entitled to the partnership assets upon liquidation. The surviving and liquidating partner has performed his duties as such as appears by the account and has turned over to himself and his associate as executors every item of property received and in his hands as such surviving partner. The Surrogate's Court did not under the statute as it existed at the time of the commencement of this proceeding have jurisdiction to settle the accounts of a surviving partner as such, but it had jurisdiction over the executors as such and jurisdiction to charge them for the benefit of the estate with any damage arising from failure to perform their duty. If an issue is presented as to whether the executors have failed to carry out and perform the duty intrusted to them by the will and that by such failure to perform their duty a loss has resulted to the estate the Surrogate's Court can determine such issue. In this case the

duty of the executors to account for the testator's interest in the partnership assets in the Surrogate's Court is emphasized and made certain by the form of the account and the submission of the items in liquidating the partnership as a part thereof to the Surrogate's Court. We think the Appellate Division was in error in refusing to sustain the decree of the surrogate.

The order of the Appellate Division should be reversed and the decree of the Surrogate's Court affirmed, with costs in both courts payable by the executors personally.

HISCOCK, COLLIN, MILLER, CARDOZO and SEABURY, JJ.,
concur; WILLARD BARTLETT, Ch. J., absent.

Ordered accordingly.

INDEX

ACCOUNTING.

- (1.) **SUBSTITUTED TRUSTEE—OBJECTIONS TO PAYMENTS MADE UNDER DECREE OF COURT—COMMISSIONS OF RESIGNING TRUSTEE DEDUCTIBLE FROM CORPUS OF TRUST FUND—RIGHTS OF REMAINDERMEN NOT INVOLVED.**

Objection to the payment by a substituted trustee of necessary disbursements in connection with the accounting of his predecessor and of commissions for paying over the trust fund will be overruled in the absence of an allegation that they were improperly allowed by the decree of the surrogate. *Matter of Kelsey*..... 118

- (2.) **SAME.**

Where under the law as it existed at the time the allowance of commissions to a resigning trustee was in the discretion of the court and having been duly allowed to the representative of the resigning trustee on the value of the trust fund and paid over to the substituted trustee they are properly deductible from the *corpus* of the trust fund. *Id.*

- (3.) **SAME.**

The substituted trustee not having accounted, the amount of \$500 paid by it to counsel, in a proceeding on the petition of a remainderman for an accounting by the substituted trustee, should be apportioned between income and principal as follows: \$125 to income and \$375 to principal. *Id.*

- (4.) **SAME.**

An objection to that part of the account which described said remainderman as entitled "to a contingent remainder interest" cannot be considered in the present proceeding as it does not involve the rights of the remainderman as the accounting was only for the purpose of showing the condition of the trust estate and payments made to the life tenants. *Id.*

ADMINISTRATION.

- (1.) **REVOCAATION OF.**

It is dishonesty on the part of the sons of decedent, now her administrators, to take from her for themselves and a sister to the exclusion

of another sister all the property their mother had at a time when her competency was questionable and to avail themselves of her willingness to give away all she had and to so distribute it that one of her children was disregarded, and letters of administration granted to said sons will be revoked. *Matter of Kirchner*..... 133

(2.) ANCILLARY LETTERS—PROOF OF LAWS OF FOREIGN COUNTRY WHEN TESTATOR DIED AND WHO ENTITLED TO HIS ESTATE.

Where, upon an application for ancillary letters of administration with the will annexed, it appears that the will was established in Peru where it was executed and where testator resided at the time of his death, and the petition does not clearly set forth who is or who are entitled to the possession of the personal property of testator in Peru, competent proof must be furnished of the laws of that country from which the authority of the person entitled to possession of the estate therein is derived. *Matter of Prevost* 121

See Executors and Administrators.

ADEMPTION.

(1) WILLS—DIRECTION TO EXECUTOR TO PURCHASE ANNUITY—WHEN BALANCE OF PRINCIPAL OF ESTATE MUST BE HELD IN TRUST—WHEN YEARLY ACCUMULATION NOT VOID.

Where a will which as a whole was designed to accomplish testator's primary object of securing for his only daughter, an incompetent, every possible care and comfort during her life, directed the executor to purchase for her an annuity of \$425 and declared the same to be "in addition to the annuities I now hold for her lifetime or hers and my own of \$800 a year," the purchase by testator of an additional \$500 annuity is not an ademption of the one of \$425 and the executor must purchase the same as directed by the will. *Matter of Langdon*..... 21

(2.) SAME.

The balance of the principal of the estate must be held by the executor in trust for the daughter during her life and from the income thereof he must make payment of the annuity and satisfy all expenses of the daughter's maintenance and hold any surplus income thereof to meet and defray any unforeseen additional or extraordinary expense for maintenance and support which does not presently exist. *Id.*

(3.) SAME.

Where a will contains no direction for the accumulation of income the necessary accumulation yearly resulting from the use of but a portion of the income is not a void accumulation under the statutes. *Id.*

CHARITABLE INSTITUTIONS.

PROVISIONS UNDER STATE CONSTITUTION FOR EDUCATION AND SUPPORT OF DEAF AND DUMB—WHEN COUNTY LIABLE FOR PAYMENT OF BILLS FOR RETENTION OF DEAF AND DUMB CHILD IN CHARITABLE INSTITUTION. *Matter of Lansing* 1

CORPORATIONS.

REPRESENTATIVE ACTION BY STOCKHOLDER—LIABILITY OF ESTATE OF DECEASED OFFICER—LOANS MADE BY BUSINESS CORPORATION OUT OF SURPLUS PROFITS—RATIFICATION OF ULTRA VIRES ACTS BY ACQUIESCENCE—SALE OF GOODS TO OFFICER OF CORPORATION—OBLIGATIONS OF OFFICER AS FIDUCIARY—RIGHT TO ACCEPT SECURITY FOR DEBT OWED BY FELLOW-OFFICER—INCREASE OF SALARIES—RESOLUTION PASSED BY VOTE OF OFFICERS RECEIVING SALARY—INFORMAL MEETING—LOANS TO DIRECTORS PERSONALLY MALUM PROHIBITUM—SUCH ACTS CANNOT BE RATIFIED—LACHES—EVIDENCE—PROOF OF LOSS TO CORPORATION NOT ESSENTIAL. *See Murray v. Smith*..... 455

DECEDENT'S ESTATE.

(1.) RESIDENCE OF DECEDENT—CHANGE OF DOMICILE.

Evidence that a person after buying a plot of land in an adjoining State, went there taking his personal belongings with him, and resided with his son while his house was nearing completion until the date of his death, and repeatedly stated that he intended to make it his residence, and that he had come there to establish a voting residence, is sufficient to establish a change of residence. *Matter of Wise*..... 189

(2.) SAME—PROCEEDING TO MORTGAGE REAL ESTATE OF DECEDENT—TO GIVE COURT JURISDICTION OF SUCH PROCEEDING NOTICE TO ALL CREDITORS AND PARTIES DESCRIBED IN THE STATUTE (CODE CIV. PRO., §§ 2523, 2754) MUST BE GIVEN AS PRESCRIBED BY LAW.

It is the function of the administrators in a proceeding to mortgage the real estate of their testator to safeguard the rights of creditors. Notice to all parties described in the statute in such a proceeding is a jurisdictional requirement and may not be dispensed with. The remedy is statutory, and the statute must be strictly followed. (Code Civ. Pro. [1911], §§ 2523, 2754.) *Matter of Reed*..... 564

(3.) SAME — EXECUTORS AND ADMINISTRATORS — ELECTION BETWEEN COMPENSATION PROVIDED BY WILL AND THAT ALLOWED BY STATUTE.

An executor to whom a specific compensation has been given by will may renounce that right within a reasonable time and elect to take the allowance given to executors by law. But such right of election may be waived. *Matter of Nester*..... 404

Thus, where a will gave to executors a certain yearly salary in lieu of all commissions and they drew the same in monthly installments for over two years, receiving checks bearing a statement that they were accepted in full of executors' salaries, and they continued to draw such salaries for another three years, there was an election to take the salary provided for in the will, although they had in the meantime filed in the Surrogate's Court a renunciation of the specific compensation and an election to take statutory commissions, which fact they concealed from those interested in the estate. *Id.*

(4.) SAME—REVOKING LETTERS—PAYMENT BY EXECUTORS FOR LEGAL SERVICES—WHEN SERVICES CHARGE AGAINST ESTATE.

It is well settled that an executor cannot bind the estate by his executory contract made upon a new and independent consideration.

Any expenditure made by an executor under such a contract for services which are for the benefit of the estate is regarded in law as a discharge of his personal obligation only until such expenditure is allowed upon the judicial settlement of his accounts. *Matter of Doscher*... 163

(5.) SAME.

Where an executor pays for such services out of the estate before the judicial settlement of his accounts, he but pays prematurely out of the fund appropriated therefor, provided such services and payments receive judicial approval; if such payment is not approved as an estate charge in that the services were not required or the fee was excessive, disallowance, whole or partial, follows, and with it the personal obligation of the executor to reimburse the estate. *Id.*

(6.) SAME.

Where letters testamentary were revoked simply because the executors had paid out of the estate funds for legal services rendered in the administration of the estate and the surrogate finds that said services were necessary, and there is not even a suggestion that the amount paid was excessive, and there was three times the aggregate amount of such payments in the estate treasury to the individual credit of the executors applicable in the event of disallowance or reduction upon a judicial settlement of their accounts, the decree revoking the letters testamen-

tary will be reversed and the matter remitted to the Surrogate's Court for procedure in accordance with the rule that the necessary expenses of administering an estate may be regarded as a charge upon although not a debt against the estate. *Id.*

- (7.) SAME—WILL—DELIVERY OF ASSETS TO TRUSTEE IN SPECIE—ELECTION BY REMAINDERMAN TO RECEIVE GIFT IN SPECIE—JURISDICTION OF SURROGATE—ELECTION BY TRUSTEE—STATUTORY CONSTRUCTION—EQUITABLE JURISDICTION OF SURROGATE'S COURT. See *Matter of Holzworth*.... 392

- (8.) SAME—ACTION UPON QUANTUM MERUIT FOR SERVICES RENDERED TESTATRIX—AGREEMENT BETWEEN PLAINTIFF AND TESTATRIX CONSTRUED. See *Plattenburg v. Briggs*..... 426

See Statute of Distribution.

EXECUTORS AND ADMINISTRATORS.

- (1.) RIGHT OF EXECUTOR TO PRESENT WILL FOR PROBATE AND TO ISSUE OF LETTERS TO HIMSELF—LIABILITY OF ESTATE FOR LEGAL EXPENSES INCURRED BY EXECUTOR IN PROCURING PROBATE AND ISSUE OF LETTERS TO HIMSELF.

It is the right, although perhaps not the absolute duty, of a person named in a will as one of the executors, not only to present the will for probate, but also to insist upon the issue to himself of letters testamentary, and reasonable legal expenses necessarily incurred in good faith in the performance of this right is a proper charge against the estate. *Matter of Fraser*..... 191

- (2.) SAME.

Hence, where one of three executors named in a will is honestly dissatisfied with the method of defense to objections to probate adopted by the attorney employed by the executors, he may employ another attorney and under proper circumstances charge the expense to the estate, although the opposition to the probate failed when it came to trial and the will was admitted practically without opposition. *Id.*

- (3.) SAME.

Legal expenses incurred by an executor in obtaining the issue of letters testamentary to himself are a proper charge against the estate, although he has taken little part in the administration thereof, especially where he has expressly waived and relinquished any claims for fees. *Id.*

(4.) SAME—WHEN LETTERS OF ADMINISTRATION SHOULD ISSUE TO ONE OF RESIDUARY LEGATEES—WHEN DECREE BECOMES INEFFECTIVE.

Where upon the consent of all parties in interest a decree was entered that letters of administration should issue to one of the residuary legatees, and to two persons not interested in the estate, the decree becomes ineffective where said residuary legatee dies before the letters are in fact issued. *Matter of Farle*..... 101

(5.) SAME—APPLICATION FOR LETTERS OF ADMINISTRATION—WHEN APPLICATION DISMISSED.

On an application for letters of administration made on the petition of one alleging that he is a surviving son of decedent, to which objections were filed by the widow of intestate alleging that the petitioner is not a son of decedent, held, that as the petitioner had not sustained the burden of proving that he is one of the persons entitled to apply for letters of administration the application must be dismissed. *Matter of Greco* 320

(6.) SAME—JURISDICTION OF SUPREME COURT TO RESTRAIN PROCEEDING IN SURROGATE'S COURT FOR REMOVAL OF ADMINISTRATOR PENDING SUIT FOR AN ACCOUNTING—SECURED CREDITOR MAY ACT AS ADMINISTRATOR. See *Met. Trust Co. v. Stallo*..... 473

(7.) SAME—LIABILITY OF SURETIES ON BOND OF ADMINISTRATRIX—ACTION BY RECEIVER IN SUPPLEMENTARY PROCEEDINGS TO ENFORCE LIABILITY OF SURETIES OF ADMINISTRATRIX FOR FAILURE TO PAY OVER MONEY IN COMPLIANCE WITH DECREE OF SURROGATE—DEFENSE—FRAUD IN PROCURING DEFENDANTS TO ACT AS SURETIES.

Sureties on the official bond of an administratrix when sued by the receiver in supplementary proceedings of the husband of the decedent, to enforce their liability for the failure of the administratrix to comply with a decree of the surrogate, directing the payment of money to the plaintiff on the theory that the judgment debtor was the husband of the decedent, and as such entitled to the money, may plead as a defense that they were induced to become sureties through the false and fraudulent representations of the administratrix and the husband of the decedent. *Stemert v. Van Aken*..... 168

(8.) SAME—RIGHT OF EXECUTOR TO WITHDRAW HIS OBJECTIONS TO A WILL AND TO JOIN IN PETITION FOR PROBATE THEREOF.

Where an executor after being granted leave to withdraw from a petition for probate and to file objections thereto, discovers that the will is entitled to probate, he should be granted leave to withdraw his objection and to again join in the petition for probate, especially where no letters

have been issued and the will will not be presented for probate unless he is permitted to join in the petition. *Matter of Dunham*..... 158

(9.) SAME—PROCEEDING TO COMPEL PAYMENT OF CLAIM—DETERMINATION AS TO PRIORITY OF JUDGMENT CREDITORS—CODE CIV. PRO., § 2687.

A proceeding to compel payment of a claim instituted on the petition of one who claims an interest through a judgment creditor of the decedent is governed by section 2687 of the Code of Civil Procedure. *Matter of Belden* 326

A contest as to priority between some of the judgment creditors of a decedent can only be properly determined in an accounting proceeding in which all interested parties are before the court, and while such a proceeding is pending a petition to compel payment of a claim will be dismissed, but without prejudice to the enforcement of any rights of the petitioner in any other proceeding or action. *Id.*

(10.) SAME—EXAMINATION OF SURVIVING PARTNER TO FRAME COMPLAINT—ACTION TO RECOVER ASSETS—PRIOR RELEASE BY TESTATOR.

Where the will of a deceased partner bequeathed his share in the firm assets to the plaintiff's testator and the latter conveyed the interest in the partnership to the surviving partner, executed a settlement agreement and released the surviving partner from accounting to the estate of the deceased partner, the executor of the legatee, after his death, is not entitled to examine the surviving partner in order to frame a complaint in an action brought by him as executor to recover assets without first having the conveyance set aside in an appropriate action. This, because the personal property of the deceased partner did not vest in his legatee's executor, but in his own personal representatives for the purpose of administration. *Riley v. McGee*..... 228

(11.) SAME—INVESTMENT OF TRUST FUNDS—VIOLATION OF EXPRESS TERMS OF WILL—INVESTMENT IN REAL ESTATE—ACCOUNTING.

In the absence of special authority in the will an executor may invest trust funds only in United States or state bonds, in loans on real estate and in the obligations of a city of this state issued pursuant to law.

Where an executor in violation of the express terms of the will invests trust funds in the real estate of his wife, the account of his administratrix will be surcharged with the sum so invested, with interest. *Matter of Horwitz*..... 327

(12.) SAME—ATTACHMENT AGAINST FOREIGN ADMINISTRATRIX UNAUTHORIZED—CODE OF CIVIL PROCEDURE, SECTION 1836a, CONSTRUED.

Section 1836a of the Code of Civil Procedure, providing that "An executor or administrator duly appointed in any other State, Territory

or district of the United States, or in any foreign country, may sue or be sued in any court in this State in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued," does not authorize a writ of attachment against an administratrix appointed in a foreign State, so as to permit the seizure of personal property belonging to the estate located in this State. *Bostwick v. Carr* 155

- (13.) SAME—DEVISE OF MORTGAGED REAL ESTATE IN TRUST—DUTY OF EXECUTOR TO PAY INTEREST ON MORTGAGES WHICH ACCRUED AFTER DEATH OF TESTATOR—POWER OF SALE OF REAL PROPERTY. See *Matter of Littlefield* 105

- (14.) SAME—ELECTION BY EXECUTOR AND TRUSTEE TO CLAIM REGULAR COMMISSIONS—WHEN RENUNCIATION OF MONEY LEGACY DOES NOT CALL FOR REVOCATION OF LETTERS TESTAMENTARY.

The fact that an executor and trustee elects to claim his regular commission by filing with the surrogate a renunciation of a money legacy given him in lieu of commissions as executor and trustee does not call for the revocation of letters testamentary to him on the ground that under the terms of the will he has, by rejecting the bequest, disqualified himself as executor and trustee. *Matter of Pulitzer*... 79

- (15.) SAME—ACCOUNTING—FUND COLLECTED IN COMPROMISE OF ACTION UNDER FOREIGN STATUTE—DIVISION OF PROCEEDS.

The account of an administratrix reported a fund collected by her in compromise of an action brought in England against the corporate owners of the steamship *Titanio* to recover damages for alleged negligence in causing the death of her intestate. The action was brought under a statute (9 & 10 Vict. chap. 93, § 2) which declares that every such action shall be for the benefit of the wife, husband, parent and child of the deceased. The intestate was survived by his wife, the administratrix herein, and one child. *Held*, that the fund must be divided equally between the wife and child, in accordance with the statute under which said action was brought. *Matter of Olsen*.... 135

- (16.) SAME—WHO CITED TO ATTEND JUDICIAL SETTLEMENT—PRESENTATION OF CLAIMS.

A creditor of a decedent, who, not having presented his claim, assigns it before the account of the administratrix is filed, need not be cited to attend the judicial settlement of her account. *Matter of Freije*.... 324

- (16a.) REMOVAL OF EXECUTOR AND TESTAMENTARY TRUSTEE—JURISDICTION OF SURROGATE—POWER TO COMBINE PROCEEDING TO REMOVE EXECUTOR WITH ONE TO FILL VACANCY—POWER OF EXECUTOR TO APPOINT SUCCESSOR.

Appeal from a decree of the Surrogate's Court removing an executor and testamentary trustee from office and appointing a successor. Evidence examined and *held*, that, in view of the conduct of the executor and trustee, he was properly removed. *Matter of Boyle*..... 451

The surrogate has power to entertain concurrently a proceeding to remove a surviving testamentary trustee and one to fill the resulting vacancy, especially where the petition is made by a cotrustee. *Id.*

Where trustees are given power to appoint a successor, but fail to do so from inability to agree, the power of appointment should not be allowed to fail where the necessities of the estate require an appointment. *Id.*

- (17.) SAME—REMOVAL OF ADMINISTRATOR—REFUSAL TO PROSECUTE ACTION—WHEN NO VIOLATION OF ORDER OF SURROGATE—PRACTICE—JOINDER OF PROCEEDING TO APPOINT ADMINISTRATOR WITH PROCEEDINGS FOR REMOVAL. See *Matter of Hill*..... 421

- (18.) SAME—SUIT BY ADMINISTRATOR, BOTH AS AN INDIVIDUAL AND IN ITS REPRESENTATIVE CAPACITY, FOR AN ACCOUNTING AND TO DETERMINE VALIDITY OF CLAIMS AGAINST ESTATE—DEMURRER—MISJOINDER OF PARTIES PLAINTIFF AND OF CAUSES OF ACTION. See *Met. Trust Co. v. Stallo No. 2*..... 484

- (19.) SAME—ACCOUNTING—AGREEMENT AS TO MANAGEMENT OF TRUST FUNDS NOT ENFORCEABLE AGAINST TRUSTEES—WANT OF CONSIDERATION FOR PROMISE OF LIFE TENANTS TO WAIVE THEIR RIGHT TO PROPORTIONATE SHARE OF EXTRAORDINARY DIVIDENDS. See *Matter of Bishop*..... 41

GUARDIANS.

WHEN COMMISSIONS GRANTED IN ACCORDANCE WITH STATUTE—WHEN GUARDIAN NOT ENTITLED TO COMMISSIONS ON INCOME RECEIVED EACH YEAR—CODE CIV. PRO., § 2753.

The commissions of a guardian must be granted in accordance with the statute in force at the time he accounts. *Matter of Chenery*.... 99

Under section 2753 of the Code of Civil Procedure, which provides that a guardian who pays over income as required and renders an annual account shall be allowed the same commissions thereon as he

would be allowed on principal on a judicial settlement, and that if he does not render such annual account he shall be allowed on the judicial settlement of his accounts commissions on the total income then payable to the beneficiary, the general guardian of an infant, who was directed to accumulate the income of a trust fund for the benefit of the ward and none of the income was ever paid to him, is not entitled to commissions on income received each year, but only on the gross income received and ready for payment to the beneficiary at the final accounting. *Id.*

HUSBAND AND WIFE.

(1.) DIVORCE.

A husband, after abandoning his wife in this State where they were married, became a resident of the State of Nevada and therein obtained a decree of divorce against his wife in an action in which she did not appear, the process having been personally served upon her in the State of New Jersey. The courts of this State will not recognize such divorce. *Matter of Akin* 108

(2.) SAME.

Such a divorce will not operate to prevent trustees of a fund from paying in their discretion the income to the husband or his wife, or partly to each, and the husband's application for an order directing the trustees to pay to him the entire income will be denied. *Id.*

(3.) WILL—CONTRACTS—CLAIM FOR BREACH OF CONTRACT TO INDEMNIFY AGAINST LOSS UNDER A WILL IN CONSIDERATION OF PROMISE TO MARRY—WHEN ORAL PROMISE TO MARRY VOID—DEFENSE OF STATUTE OF FRAUDS AND STATUTE OF LIMITATIONS. See *Matter of Hibbard*.... 124

JURISDICTION.

(1.) JUDGMENTS—FOREIGN—INQUIRY AS TO JURISDICTION—DIVORCE—FOREIGN—EFFECT AS TO RIGHT TO INCOME OF TRUST FUND.

The courts of this State are not prevented by the "full faith and credit" clause of the Federal Constitution from inquiring into the jurisdiction of a court of a sister State to render a judgment upon which either of the parties to an action relies as the basis of right to invoke the aid of our courts. *Matter of Akin*..... 108

(2.) SURROGATE'S COURT—JURISDICTION OF SURROGATE TO DETERMINE ISSUES RAISED ON PETITION FOR ACCOUNTING—CONTENTION THAT WAIVER OF

ACCOUNTING AND RELEASE WAS OBTAINED BY SURROGATE—PRACTICE—
SEPARATE TRIAL OF ISSUES RAISED IN SURROGATE'S COURT—JURY TRIAL
NOT CONSTITUTIONAL RIGHT—INJUNCTION RESTRAINING TRANSFER OF
TRUST ESTATE. See *Matter of Fox*..... 511

(3.) WHEN EXECUTRIX MAY ENFORCE LEASE FOR BENEFIT OF ESTATE—
ACTION TO COMPEL SPECIFIC PERFORMANCE OF COVENANT TO CONVEY.

A lease for years and all rights thereunder belong to the personal representative of the owner of the lease and his executrix may enforce for the benefit of the estate any covenant of the lease whether it runs with the land or not. *Walker v. Bradley*..... 53

(4.) SAME.

Where a decedent at the time of his death was the owner of an unexpired lease for years, containing an optional clause for the purchase of the premises by the lessee, his executrix may maintain an action to compel specific performance of the covenant to convey. *Id.*

(5.) JURISDICTION TO DETERMINE OWNERSHIP OF PROPERTY NOT IN POSSESSION OF TESTATRIX AT TIME OF HER DEATH.

The jurisdiction of the Surrogate's Court to distribute the estate of a decedent, and to determine contested claims, does not include the power to try the question of title to personal property not in the possession of a testatrix at the time of her death. *Matter of Watson* 182

(6.) SAME.

Hence, the Surrogate's Court has no jurisdiction upon an accounting by executors to determine the ownership of personal property alleged to belong to an estate, but which, in fact, was in the possession of one of the executors at the time the testatrix died. *Id.*

MOTIONS AND ORDERS.

WHEN INTERLOCUTORY ORDER IS NOT RES ADJUDICATA—MOTION TO DISMISS
OBJECTIONS FILED TO PROBATE DENIED.

Ordinarily, an interlocutory order in an action is not *res adjudicata*.

A decision of the Appellate Division, reversing an order granting alimony and counsel fees in an action for a separation upon the ground that the alleged marriage between the parties is void, is not conclusive on the plaintiff in said action in a proceeding to probate the will of her alleged husband, and a motion to dismiss objections filed by her to the probate of his will on the ground that the decision of the Appellate Division was *res adjudicata* on the question of marriage must be denied. *Matter of Mostofsky* 377

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PARTITION.

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PARTNERSHIP.

PARTNERSHIP—DECEDENT'S ESTATE—CONSTRUCTION OF AGREEMENT AS TO OWNERSHIP OF MEMBERSHIP IN STOCK EXCHANGE PURCHASED WITH PARTNERSHIP ASSETS IN NAME OF DECEDENT—JURISDICTION OF SURROGATE TO CHARGE EXECUTORS WITH LOSS CAUSED BY DELAY IN SALE OF MEMBERSHIP IN STOCK EXCHANGE. See Matter of Hearn.....	568
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PRACTICE.

- (1.) PRACTICE—JURY TRIAL OF ISSUES ARISING ON PROBATE OF WILL—CODE AMENDMENT MADE IN 1914 NOT APPLICABLE TO PENDING LITIGATION—STATUTES CONSTRUED.

As section 2771 of the Code of Civil Procedure expressly provides that the amendments to chapter 18 of the Code relating to Surrogates' Courts shall not affect any action or special proceedings pending when the amendment takes effect, the surrogate has no power to order that issues raised in a proceeding to probate a will shall be tried by a jury in the Supreme Court, where the proceeding was commenced before September 1, 1914, the date that the amendment allowing such trial went into effect. Matter of Iovinella

434

- (2.) SAME.

Section 2771 of the Code of Civil Procedure, making the amendments aforesaid inapplicable to a litigation pending before the amendment, affects not only litigation pending in those counties having special laws, but all litigation in the Surrogate's Courts throughout the State. Id.

SAVINGS BANKS.

- (1.) WHERE DEPOSIT IN SAVINGS BANK EXPRESSLY STATED TO BE JOINT ACCOUNT—WHEN DEPOSIT SUBJECT TO TRANSFER TAX—TAXES.

Where a savings bank deposit of \$3,000, made in 1908 in the name of Mrs. Jane H. Reed, the decedent, and a niece, was expressly stated to be a joint account with right of survivorship payable to either or to survivor, the full and complete ownership of the whole deposit was not intended to vest in the niece until she became the survivor at the death of decedent in 1914, and the deposit is subject to a transfer tax. Matter of Reed 56

- (2.) SAME.

Where decedent, shortly after making a deposit of \$3,000 in a savings bank in 1910 "In account with Mrs. J. H. Reed or Mrs. Sarah M. Clute, her sister," informed said sister of the fact and showed her the pass-book, there was a gift *inter vivos* of one-half of the deposit, thus creating a tenancy in common, and one-half is subject to a transfer tax. Id.

- (3.) SAME.

Where decedent, soon after making a deposit of \$3,000 in a savings bank in 1911 in the name of "Mary J. Reed in trust for Dow S. Clute," showed the bank book to Dow who was an infant, and to his father, and told them that she intended it to be for the benefit of the infant and "that it was and was to be his and to belong to him" there was a present transfer by way of a gift *inter vivos* and the same was not subject to a transfer tax, it being conceded that Jane H. Reed and Mary J. Reed are the same person. Id.

- (4.) SAME.

A deposit made by decedent in 1910 "In trust for her nephew Fred S. Clute" amounted to a gift *inter vivos* and the title to the deposit passed at that time and was not subject to a transfer tax. Id.

STATUTE.

- WHO TAKES ENTIRE PERSONAL PROPERTY—APPLICATION TO INTERVENE IN PROCEEDING TO PROBATE, WHEN DENIED.

Where a testator died in 1915 leaving him surviving no next of kin nearer than cousins and children of deceased cousins, the cousins take the entire personal estate, and an application by the children of deceased

cousins to intervene in a proceeding to probate the will upon a claim that petitioners would be entitled to share in decedent's estate if it were found that he died intestate must be denied. *Matter of Polansky*.. 349

See Decedent's Estate.

TRANSFER TAX.

- (1.) ON SAVINGS BANK DEPOSIT MADE IN 1819—NO PRESUMPTION THAT DECEDENT DIED PRIOR TO 1885—TIME OF DEATH MUST BE ESTABLISHED BY PROOF—MOTION TO VACATE ORDER MADE IN 1911 ASSESSING TAX DENIED.

In 1819 decedent made a deposit of \$47 in a savings bank which he never withdrew and upon the application of the public administrator to whom in 1901 letters of administration were issued an inheritance tax of \$109.18 was assessed in 1911 upon said deposit and accumulated interest. *Held*, that an application to vacate the order fixing the tax should not be granted unless it was found as a fact that decedent died prior to 1885 when the first inheritance tax law was passed and that no demand for payment of the deposit was made raised no presumption that decedent died before the year 1885. *Matter of Bernard*..... 122

- (2.) SAME.

Where the time of death is material it cannot rest on presumption, but must be established by proof. *Id.*

- (3.) PROCEEDING TO FIX CASH VALUE OF SHARES OF STOCK—WHEN ARBITRARY DEDUCTION OF AMOUNT CLAIMED FOR DEPRECIATION IN VALUE OF STOCK CANNOT BE ALLOWED. *Matter of Roos*..... 351

TRUSTS.

- (1.) WHEN PROVISION FOR USE OF INCOME FOR HOME TO BE MAINTAINED FOR "REFINED, EDUCATED, PROTESTANT GENTLEWOMEN" VOID.

Where testatrix gave to her executors a certain sum in trust the income to be used for hiring a house to be maintained and used as a "Home for Refined, Educated, Protestant, Gentlewomen—whose means are small—and whose home is made unhappy, by having to live with Relatives, who think them in the way," but the will discloses that by such provision testatrix intended to provide a home for six relatives, naming them, and their descendants, naming them, and six friends, naming them, to the exclusion of all others, the trust attempted to be

created is not a charitable trust and is absolutely void, and as to the *corpus* of said attempted trust it will be decreed that testatrix died intestate. *Matter of MacDowell*..... 11

- (2.) TESTAMENTARY TRUST—PROVISION THAT TRUST FUND BE PAID TO LEGATEE WHEN HE IS FINANCIALLY SOLVENT—PAYMENT OF SUCH FUND TO LEGATEE AFTER DISCHARGE IN BANKRUPTCY—WHEN TRUSTEE IN BANKRUPTCY CANNOT REOPEN PROCEEDINGS AND MAINTAIN ACTION TO REACH THE FUND.

A testator authorized his trustee to pay over to his son the principal of a trust fund upon a statement by the son that "he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund." The son was declared a bankrupt and discharged from his debts. The testamentary trustee thereupon, in pursuance of a decree of the Surrogate's Court, paid the trust fund over to him. Thereafter the estate of the bankrupt was reopened and the appellant as trustee in bankruptcy brought this action to reach the fund. *Held*, that the action cannot be maintained. *Hull v. Palmer*. 262

- (3.) TESTAMENTARY TRUSTS—WHEN ALL PROVISIONS OF A TRUST MUST BE CONSTRUED TOGETHER AND STAND OR FALL TOGETHER—TRUST PROVISIONS OF A WILL CONSTRUED AND HELD IN VIOLATION OF THE STATUTE OF PERPETUITIES. *Bailey v. Buffalo Loan, T. & S. D. Co.*..... 275

- (4.) TRUSTEES—TESTAMENTARY—DIRECTION TO PAY GENERAL GUARDIAN ACCUMULATED INCOME OF TRUST FUNDS.

Where testamentary trustees are directed to set apart as a separate fund either money or securities, or both, sufficient in their judgment to produce a clear net income in a certain amount and pay the same from the time of testator's death to a certain person six years of age for the purpose of his education until he becomes of age, the trustees will be directed to pay his father as general guardian the accumulated income of the trust funds, the trustees under the language of the will having no discretion in the matter. *Matter of Hartley*..... 364

- (5.) RIGHT OF TRUSTEE TO APPEAL FROM DECREE IN FINAL ACCOUNTING—CORPORATIONS—BASIS FOR DECLARATION OF STOCK DIVIDEND—WHEN RIGHT TO STOCK DIVIDEND VESTED.

The fact that on an accounting by a trustee the life tenant and her husband, father, mother, brother and sisters, being all the persons entitled to the remainder, appeared, but all failed to appeal, is not a ground for a dismissal of an appeal by the trustee, as the remainders may be contingent. *Matter of Osborne* 467

(6.) SAME.

Where directors of a corporation *after* directing a stock dividend which had previously been authorized by the stockholders at the same meeting adopt a resolution authorizing a cash dividend out of the profits of the corporation, the amount of the cash dividend should not be considered as having been deducted from the surplus of the corporation used as a basis for the declaration of the stock dividend. *Id.*

(7.) SAME.

The right to a stock dividend becomes vested when it is authorized even though the certificates are actually delivered thereafter. *Id.*

(8.) TRUST—DEATH OF EXECUTORS AND TRUSTEES BEFORE EXECUTING POWER OF SALE—VESTING OF UNEXECUTED TRUST IN SUPREME COURT, UNDER SECTION 111 OF REAL PROPERTY LAW—VALIDITY OF SALE BY TRUSTEE APPOINTED BY COURT. See *Forman v. Young*..... 517

(9.) SAME—DUTY OF TESTAMENTARY TRUSTEE—NEGLIGENCE IN FAILING TO TURN SECURITIES INTO CASH—LIABILITY FOR RESULTING LOSS.

Where a will required the executors to set apart certain amounts in cash or securities to be held in trust by the defendant, an incorporated trust company, for the payment of two specified annuities, and further gave to the trustee power to retain in the trust fund any securities owned by the testator at the time of his death, received by the trustee for the purposes of the trust without being liable for the fact that such securities were not legally permissible for trust investments, the trustee may, nevertheless, be held liable where certain securities turned over to it by the executors so decreased in value while in its hands that it was unable to pay the annuities, if it was negligent in that it took no steps to ascertain the fact that the securities turned over were not those originally held by the testator, but had been purchased by the executors with the proceeds of securities sold by them, and took no steps to turn the securities into cash or other securities during the time that they were decreasing in value. *Villard v. Villard*..... 398

WILL.

(1.) PROBATE—DOCUMENT INCORPORATING AT LENGTH EARLIER INSTRUMENTS WHICH TESTATOR DECLARED HE COULD NOT FIND BUT DID NOT REVOKE—PROBATE GRANTED.

A paper offered for probate as decedent's last will opened with a recital by him that he had earlier made his last will and testament and several codicils thereto; that he could not find them; that he had not

in any manner revoked them, and that the following, incorporating the earlier instruments, are copies of said last will and testament and codicils. The document then closed with the following: "Now, therefore, I, the said Joseph H. Bearns, do hereby re-publish the said last will and testament and said codicils thereto, and do hereby declare the same to be my last will and testament and codicils thereto." The testator's signature appeared at the end of the paper and the usual attestation clause was subjoined, signed by three witnesses.

Held, that it appearing that the instrument was subscribed, declared and attested in the full form required for the execution of a will, it is entitled to probate. *Matter of Beams*..... 129

- (2.) SAME—OPENING OF DECREE OF PROBATE—CODE CIV. PRO., § 2490(6).
See *Matter of Lord*..... 303

- (3.) SAME—WHEN PROBATE DENIED—TESTAMENTARY CAPACITY—BURDEN OF PROOF.

Where the uncontradicted facts show that at the time of the making of her alleged last will testatrix was a diseased, drug-eating, dying old woman, and because of bodily and mental infirmities and her absolute seclusion in her own house was practically prevented from receiving independent and unselfish advice, and it appears also that her habitual use of morphine and codein in large quantities continued up to within a day or two of her death which was less than a month after the execution of the alleged will, which was the third one made by her during the last nine months of her life, and by which she disposed of an estate of over a million dollars in value, probate will be denied on the ground that proponents have not sustained the burden of proof of clearly and satisfactorily showing that at the time of executing the will testatrix had testamentary capacity and that the instrument expressed the free and untrammelled will of a capable testatrix. *Matter of Cutter*.... 84

- (4.) SAME—PROBATE OF—WHEN FACTS UNKNOWN CANNOT BE REGARDED IN DETERMINING STATE OF MIND—EVIDENCE AS TO EXISTENCE OF A FACT—WHAT CONSTITUTES INSANE DELUSION. See *Matter of Stoll*..... 343

- (5.) WHEN DECLARATIONS OF TESTATRIX INADMISSIBLE AS EVIDENCE OF TESTAMENTARY INTENTION—PRESUMPTION THAT TESTAMENTARY GIFT IS ABSOLUTE UNLESS QUALIFIED BY WORDS OF GIFT—WORDS OF LIMITATION—HEIRS AND ASSIGNS.

Unless a will is ambiguous or equivocal the declarations of the testatrix to the draftaman of the will are inadmissible as evidence of testamentary intention. *Matter of Vosseler*..... 94

(6.) SAME.

Where a residuary estate was given to four persons, one of whom was Mrs. H, a sister-in-law of testatrix, "their heirs and assigns, to have and to hold the same to their own use, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*," the gift to Mrs. H will be regarded as absolute and not as substitutional, and lapsed upon her dying before testatrix. *Id.*

(7.) SAME.

The presumption is that a testamentary gift is absolute unless clearly qualified by the words of gift. *Id.*

(8.) SAME.

Before the Revised Statutes the doctrine of lapse applied indiscriminately to gifts with and without words of limitation to heirs or to heirs of the body, and it also applied equally to gifts of personalty even where words of limitation to executors or administrators had followed a bequest to a person deceased before the will took effect. *Id.*

(9.) SAME.

The Revised Statutes (2 Rev. Stat. 66) saved devises and bequests to a particular child or other specified descendant of testator and did not refer to devises and bequests to any other person, and the disposition of testatrix's residuary estate did not come within those classes of devises and bequests to which the doctrine of lapse does not apply. *Id.*

(10.) SAME.

The devise under the residuary clause was not to a class but rather to the devisees named and cannot be construed as intending to vest a life estate in the named beneficiaries and a remainder to their heirs. *Id.*

(11.) SAME—TESTAMENTARY CAPACITY—WHEN TESTATRIX NOT SUBJECT TO UNDUE INFLUENCE—EVIDENCE—WHEN WILL ENTITLED TO PROBATE.

If a testatrix at the time of making her last will is capable of appreciating the value of her property, and can recollect her relatives and any possible claimants upon her bounty for a sufficient length of time to enable her to form a rational judgment concerning these elements, and if she can appreciate the scope and bearing of all the provisions of her will, she has testamentary capacity. *Matter of McCusker* 74

(12.) PROOF OF DUE EXECUTION AND OF QUALIFICATIONS OF TESTATOR—BURDEN OF PROOF AS TO TESTAMENTARY CAPACITY.

Before a propounded document can be admitted to probate as a last will and testament there must be shown to the satisfaction of the

surrogate not only that the same has been executed with the formalities prescribed by section 21 of the Decedent Estate Law (Laws of 1909, chap. 18; Consolidated Laws, chap. 13) but also that the person alleged to have executed the same was free from the disqualifications set forth in section 10 of the Decedent Estate Law, as to real estate, and was possessed of the qualifications prescribed by section 15 of the Decedent Estate Law as to personal estate. Among these is that to the effect that the alleged testator must be of sound mind. *Matter of King*.. 61

(13.) SAME.

The burden of proving testamentary capacity, like the burden of proving the formalities of execution, is upon the proponent. *Id.*

(14.) SAME.

Probate of will denied upon the ground that the decedent at the time of the execution of the alleged will did not possess testamentary capacity. *Id.*

(15.) WILL—BEQUEST TO RELIGIOUS AND BENEVOLENT USES UNDER SECTION 12 OF PERSONAL PROPERTY LAW.

A provision in a will as follows: "I give, devise and bequeath to the Methodist Episcopal Church for missionary or evangelistic purposes the sum of three thousand dollars in memory of my father and mother," and others named, constitutes a "bequest to religious * * * or benevolent uses, within the meaning of section 12 of the Personal Property Law, and is valid. *Matter of Norton*..... 236

(16.) UNDUE INFLUENCE—TESTAMENTARY CAPACITY—FAILURE TO SUSTAIN BURDEN OF PROOF—WHEN NOT SUFFICIENT TO RENDER TESTAMENTARY DISPOSITION INVALID.

Before an instrument propounded as a will can be criticised as unnatural for the reason that it ignores relatives and leaves all of decedent's estate to strangers, the relations existing between the decedent and his heirs at law and next of kin should be considered to ascertain whether it is contrary to what the testator from his feeling towards his relatives, if known, would have been expected to make; and when such inquiry disclosed an apparent lack of intimacy between the testator and his relatives and a seeming lack of interest on their part for the welfare and care of the testator in his old age and ill-health, *held*, that little weight can be given to the contention that the provisions of the propounded document are unnatural and indicate a lack of testamentary capacity. *Matter of McDermott* 356

(17.) 'SAME.

Undue influence is an affirmative assault upon the validity of a will and must be proved by the contestant. *Id.*

(18.) WILLS—WHAT QUESTIONS INVOLVED UPON PROBATE OF—EVIDENCE—SUBSCRIBING WITNESSES—RULE APPLICABLE TO ANCIENT DOCUMENTS—SATISFACTORY PROOF OF HANDWRITING *—CODE CIV. PRO., § 933. See *Matter of Hall* 298

(19.) OLD AGE NOT DISQUALIFICATION IN A TESTATOR—WHEN WILL ENTITLED TO BE ADMITTED TO PROBATE. See *Matter of Neil*..... 366

(20.) WILLS—VALIDITY AND EFFECT OF TEMPORARY DISPOSITION OF PERSONAL PROPERTY, HOW REGULATED—INCOMPETENTS MAY EXECUTE VALID WILL*—WEIGHT OF TESTIMONY OF EXPERT WITNESSES AS TO MENTAL CONDITION. See *Matter of Schober*..... 310

(21.) WILL—EXECUTION—INSTRUMENT MUST BE READ TO BLIND TESTATOR—STATUTORY ACTION TO TEST VALIDITY OF PROBATE—EVIDENCE—BURDEN OF PROOF.

On a proceeding to probate a will the proponent must satisfy the surrogate that it was executed with all the formalities required by law and, if the testator was blind, he must show that he was made aware of the full contents of the paper he was executing. This rule, however, refers to the probate of a will by the surrogate. *Primmer v. Primmer*.... 429

(22.) SAME.

Where an action is brought under section 2653a of the Code of Civil Procedure to test the validity of such probate, the decree of the surrogate admitting the will to probate is declared by the statute to be *prima facie* evidence of due execution and of the validity of the will. Hence, the burden is shifted to the plaintiff in such action to show lack of due execution and validity, and where he claimed that the testator was blind and that the instrument was not read to him, he is under the burden of showing such facts. The proponent-defendant is not under the burden of showing that the will was in fact read over to the testator. *Id.*

(23.) SAME—DECLARATIONS CONTAINED IN—BEQUEST OF CERTAIN AMOUNT AND ALL MONEYS COLLECTED FROM LIFE INSURANCE IN LIEU OF DOWER.

Where a will declares that a bequest to testator's wife of \$30,000, and all moneys collected at his death from life insurance, whether in his name or hers, which together aggregate in amount \$50,000 which he intends she shall receive and which sum he declares is deemed by

him to be sufficient to maintain her comfortably during the rest of her life, and said sum is given in lieu of her dower right in his real estate, she is entitled to \$50,000 in the aggregate and not the \$30,000 plus \$21,021.23, the proceeds of the life insurance. Matter of Spingarn. 103

(24.) WILL—CONSTRUCTION—INTENT OF TESTATOR—WHEN RESIDUARY LEGACY AND DEVISE DOES NOT LAPSE UPON DEATH OF LEGATEE.

A testator, who left him surviving no widow, issue, father, mother, brothers, sisters, uncles or aunts, after devising to his cousin, Charles Ritchie, the father of two infants, a house and lot, devised another house and lot to said Charles Ritchie and another cousin. Two following subdivisions of his will provided as follows: "*Sixteenth*. Should any of the gifts and bequests made by me in this my will lapse or fail for any reason, I direct that the gift or bequest so lapsing or failing shall go to form part of my residuary estate and be disposed of under and in accordance with the seventeenth paragraph of this my will. *Seventeenth*. All the rest, residue and remainder of my property and estate, as well real and personal and wheresoever situate which, at the time of my death shall belong to me or be subject to my disposal by will, I give, devise and bequeath unto Charles Ritchie hereinbefore named, absolutely and in fee to his heirs, executors and administrators and assigns, according to the nature of the property." Charles Ritchie died a few days before the testator, leaving him surviving as his heirs at law and next of kin the two infants. The testator's only next of kin are four first cousins. Matter of Murphy..... 231

(25.) SAME.

Provisions of the will construed, and *held*, that it was the intention of the testator to substitute and give such part of his residuary estate as was real property to the heirs, and such part as was personal property to the executors and administrators of Charles Ritchie, for the benefit of his next of kin, in the event that his legatee did not survive him. *Id*.

(26.) SAME.

That, therefore, the devise and legacy given by the 17th paragraph of the will did not lapse on the death of Charles Ritchie, but, under its provisions, his heirs take the real property and his next of kin the net personal estate. *Id*.

(28.) WILLS—PROVISIONS OF CODICIL—DIRECTION TO TRUSTEES AS TO TRUST FUND—AUTHORITY TO EXECUTOR TO PAY SUCH PART OF PRINCIPAL AS DEEMED PRUDENT—WHEN RIGHT TO PRINCIPAL OF TRUST FUND ABSOLUTE.

A provision in a codicil which purports to limit or defeat a bequest given by a will will not be given this effect unless the language of the

codicil is as clear and explicit as that of the will to which it relates.
Matter of Gross 112

Testator by his will directed his trustees to set apart the sum of \$20,000 for each of his daughters and pay the income thereof to each of them, and directed that \$3,000 of the principal be paid to each upon her marriage and that the unimpaired principal in the case of an unmarried daughter, or the remaining principal in case of a married daughter, be paid to each when the youngest child surviving testator reaches majority. By a codicil the executors were authorized and empowered in their discretion to pay to said daughters such part of the principal as they might deem prudent. *Held*, that upon the youngest daughter reaching her majority her right to the principal of the trust fund, and also that of her sisters, was absolute, and not subject to the discretion and approval of the trustee. *Id.*

(29.) WILLS—BEQUESTS UNDER—NAME IN RESIDUARY CLAUSE ERRONEOUS—DEVISE OF ALL REST, RESIDUE AND REMAINDER.

By the third paragraph of his will testator bequeathed to "Anne McGrath of Vandebilt Avenue near Atlantic Ave., Brooklyn, one hundred dollars, to Annie Farrell all my family pictures." By the next paragraph all the rest, residue and remainder of the estate was devised and bequeathed to testator's son-in-law and "Annie McGrath of 519 Greene Ave." in equal shares. *Held*, that the name "McGrath" in the residuary clause was erroneously written in the place in which the name "Farrell" should have been written and that the gift of one-half of the residue was to Annie Farrell. *Matter of Daly*..... 374

(30.) WILL—BEQUEST TO EMPLOYEES—CONSTRUCTION.

Where a bequest of a certain sum to each person in the employ of a corporation at testator's death, mentioned in the will, expressly provided that piece workers should not be included, the time spent by a piece worker, as such, who subsequently became a salaried employee of the corporation should be excluded in determining the length of service. *Matter of Altman* 115

(31.) WILLS—CONSTRUCTION OF BEQUESTS OF PERSONAL PROPERTY—CORPORATIONS—WHAT PASSES UNDER BEQUEST OF CERTAIN SHARES OF STOCK.

A bequest of "my one hundred and sixty-six shares of St. Jo Lead Mining Company" and "thirty-three shares of Cattle Co." is a specific bequest and the will in its relation thereto must be construed as of the date of its execution. *Matter of Adams*..... 332

When testatrix made her will she was the owner of 166 shares of mining stock and 33 shares of the stock of a cattle company. At a

reorganization of both companies she received 16 shares of mining stock in exchange for her holdings in the cattle company. Thereafter, because of her ownership of the original 166 shares she received 472 shares in stock dividends all of which resulted from the distribution of the surplus accumulated by the mining company, and at the time of her death she was the owner of 654 shares of the mining stock. Held, that they all passed under the bequest of "my 166 shares," etc. Id.

(32.) WILL—CONSTRUCTION OF DEVISE—EVIDENCE—WHEN PAROL EVIDENCE WILL BE RECEIVED TO EXPLAIN WHAT LANDS ARE INCLUDED IN THE DEVISE.

1. Generally speaking a will bears its own testimony, but where the description of the property sought to be devised is so uncertain as to leave in doubt what was the subject of disposition, parol evidence is to be received and considered. Such evidence is received, not to contradict the provisions of the will, but, when it is doubtful what lands are included in a devise, to explain to what particular pieces of land the language of the will referred. *Matter of Phipps*..... 559

2. The second clause of testator's will provided that in case his wife survived him she should have the "life use of my Homestead Farm containing about thirty acres of land, together with the Mosher land, so-called, forming a part of said Homestead Farm." On examination of the will and of the evidence given on the trial, *held*, that the Surrogate's Court correctly held that the term "Homestead Farm" as used in the will refers to the dwelling house where the testator and his family lived, with its appurtenances and outbuildings and the land used in connection therewith, and does not include other lands of the testator. Id.

(33.) WILL CONSTRUED—BEQUESTS TO NIECE AND HER DESCENDANTS—WHEN LEGACY LAPSSES—WHEN LEGATEES TAKE AS TENANTS IN COMMON, NOT AS A CLASS—WHEN WILL CONVEYS AFTER-ACQUIRED PROPERTY—REAL ESTATE PURCHASED BY TESTATRIX AFTER MAKING WILL—WHEN GENERAL LEGACIES CHARGED ON LANDS NOT SPECIFICALLY DEVISED—EVIDENCE—INTENTION OF TESTATRIX—ACCOUNTS KEPT BY TESTATRIX—COSTS—ALLOWANCES IN SUIT TO CONSTRUCT WILL. See *Carley v. Harper*. 438

(34.) WILL—DEVISE OF LANDS IN TRUST, WITH DISCRETIONARY POWER OF SALE IN EXECUTORS—TRUST FOR LIVES, WITH REMAINDERS OVER—WHEN LIFE BENEFICIARIES CANNOT COMPEL SALE OF LANDS WHICH DO NOT PRODUCE INCOME—SALE TO PAY CARRYING EXPENSES OF LANDS—PRIOR DECREE THAT RESIDUARY CLAUSE WORKS CONVERSION—EFFECT OF SUCH DECREE. See *Lawrence v. Littlefield*..... 501

(35.) WILL—PREFERRED LEGACY—INTENT OF TESTATOR—EVIDENCE—EX-
TRANEOUS FACTS.

The question as to whether a testator intended to prefer a certain legacy over others, so that it should be paid in full and the others abate *pro rata* where the assets are not sufficient to pay all, may be determined not only from the terms of the will itself, but also from extraneous circumstances, including the testator's relations with and conduct toward the legatee. *Matter of Lloyd*..... 379

(36.) SAME.

Thus, an intent to prefer such legacy may be found where the testator, a bachelor, treated the legatee as his child during his lifetime, and provided her with a home without cost after her marriage, and promised thereafter to provide her a permanent home, which should go to her issue should she not survive him, and he differentiated such legacy from other legacies in that he ordered it to be paid within a year.

(37.) WILL—ACTION FOR CONSTRUCTION—LATENT AMBIGUITY IN DESIGNA-
TION OF LEGATEES—WHEN INSTRUCTIONS OF TESTATOR TO ATTORNEY
WHO DREW WILL NOT PRIVILEGED—ERRONEOUS EXCLUSION OF TESTIMONY
OF SUCH ATTORNEY AS TO SUCH INSTRUCTIONS. See *Bauman v. Stein-*
gester 269(38.) WILL—ACTION FOR CONSTRUCTION—JUDGMENT VALID, ALTHOUGH
IMPROPER PERSON APPOINTED GUARDIAN AD LITEM—GUARDIAN AD LITEM
WRONGFULLY APPOINTED NOT ENTITLED TO COMPENSATION—WHEN
COURT MAY COMPEL GUARDIAN AD LITEM TO REPAY MONEYS RECEIVED
FOR SERVICES.

Where, in an action for the construction of a will, there is a substantial contest between two sons of the testator and four other children who are infants, an attorney who, by means of a misleading affidavit, is appointed guardian *ad litem* for the infants, and appears on the trial of the action in behalf of all of the defendants, although the other members of his firm are attorneys for the two sons, is not entitled to payment out of the estate of the infants for his services as guardian *ad litem*, because he was not a competent person to be appointed, within the provisions of rule 49 of the General Rules of Practice. *Huel v. Stein* 138

(39.) SAME.

The appointment of such a person as guardian *ad litem* was not void, however, and the judgment entered was binding upon the infants as well as the adult heirs of the testator. *Id.*

(40.) SAME.

Where, on a motion for an order revoking and setting aside any provisions made for the compensation of such a guardian *ad litem*, it appears that the attorney after being denied an order fixing his compensation under rule 50 of the General Rules of Practice, procured payment from the executors of the testator, without an order of the court, which was allowed upon a subsequent accounting, the decree of the surrogate is *res adjudicata* as between the executors and the heirs, but is not conclusive as between the attorney and his former wards, and, hence, the court may require him to repay the sum which he received from the executors as compensation, with interest, under the provision of the notice of motion asking for "such other and further relief as may seem to the court just and proper." *Id.*

(41.) WILL—CONSTRUCTION—SPECIFIC LEGACY.

A bequest of "the mortgage and bond for \$10,000, now held by me against premises on 176th Street," followed by several general legacies payable out of the estate, constitutes a specific legacy, which can only be satisfied by delivering to the legatee the identical thing given and, hence, fails where the decedent never owned such bond and mortgage. *Matter of Solomon* 185

(42.) WILL—DIRECTION THAT BUSINESS BE CONTINUED BY SURVIVING PARTNER—ANNUITY TO WIDOW—ACCEPTANCE OF LEGACY BY SURVIVING PARTNER—OBLIGATION TO WIDOW—PARTIES—REPRESENTATIVES OF TESTATOR—JOINDER OF ACTIONS.

Where a will provided that the testator's partner should carry on the partnership business during the lifetime of the testator's wife and pay her interest on the testator's capital invested in the business and an annuity out of the profits, the balance of the profits to be retained by the surviving partner, the latter by accepting the legacy of the surplus profits accepted also the obligation to make the payments to the testator's widow. *Sturmwald v. Poppe*..... 386

(43.) SAME.

In an action by the widow against the personal representatives of her husband's partner, since deceased, to recover sums due under the will aforesaid, she need not make her husband's representatives parties to the action, for the husband's estate had no interest in the partnership business during the plaintiff's life. *Id.*

(44.) **SAME.**

Moreover, the plaintiff may recover in one action moneys which became due from her husband's partner during his lifetime and moneys due from his estate after his death. *Id.*

(45.) **WILL—CONSTRUCTION OF PROVISION CREATING TRUST OF TESTATOR'S RESIDUARY ESTATE FOR BENEFIT OF HIS DAUGHTER FOR LIFE—DISPOSITION OF FUND UPON DEATH OF SURVIVOR OF DAUGHTERS.** See *Hadcox v. Cody* 292

(46.) **WILLS—PROVISIONS OF—SCHEME OF WILL SHOWING INTENTION TO DIVIDE PROPERTY INTO TWO PARTS—WHEN RESIDUARY LEGATEES NOT ENTITLED TO SECURITIES CONSTITUTING PART OF ESTATE RECEIVED BY TESTATRIX FROM HER FATHER.** See *Matter of Wesler*. 25

(47.) **WILL—GIFT OF REMAINDER TO ISSUE OF BENEFICIARY OF LIFE ESTATE—WORD "ISSUE" HELD TO INCLUDE DESCENDANTS TAKING BY REPRESENTATION OR PER STIRPES.** See *Matter of Farm, Loan and Trust Co.* 245

(48.) **WILLS—DIRECTION AS TO DISPOSITION OF ALL REST, RESIDUE AND REMAINDER—WHERE THE LANGUAGE OF IS INEXACT OR AMBIGUOUS—REAL MEANING OF TESTATOR—EXECUTORS AND ADMINISTRATORS.** See *Matter of Robbins* 32

(49.) **WILL—TRUST—SUSPENSION OF POWER OF ALIENATION—WHEN INVALID TRUST PROVISION MAY BE DISREGARDED—DISPOSITION OF INCOME DURING TRUST TERM.** See *Ripley v. Guaranty Ins. Co.*. 195

(50.) **WILLS—PROVISIONS OF WILL FOR DIVISION OF TESTATOR'S ESTATE INTO SEVEN EQUAL PARTS—TRUSTS—WHEN GRANDCHILDREN EXCLUDED.**

A will, after providing for the division of the residue of testator's estate into seven equal parts, the gift outright to three persons therein named and a devise in trust of the four remaining parts for purposes separately stated with respect to each share, continued: "Upon the further trust to designate and set apart the remaining equal part or share for the use of my son * * * to receive the rents, income and profits thereof, and apply the same to his use during his natural life, and at his death to pay, divide and distribute the capital of such last mentioned share to and among his lawful issue equally." Said son died leaving three children now surviving two of whom have each a child. *Held*, that the decree entered upon the judicial settlement of the account of the trustee should provide for the division of the fund once held for the benefit of testator's deceased son among his three children to the exclusion of the grandchildren. *Matter of Meeker*. 50

- (51.) **WILLS—VALIDITY OF LEGACIES TO WITNESSES—RESCISSION OF CONTRACT TO ALLOW PAYMENT OF INVALID LEGACIES UPON GROUND OF MISTAKE OF FACT—AGREEMENT INDUCED BY MISREPRESENTATION AS TO FOREIGN LAW.**

Where the sole witnesses to a will were named as legatees and the will was proved by means of their testimony, thus avoiding the legacies, agreements, executed between non-resident legatees and the executors, but not carried out, consenting to the payment of the void legacies and signed solely in reliance upon a misrepresentation as to the law of this State, made by a representative of the witnesses, may be rescinded upon the ground of a mistake of fact, without imputing fraud or intentional misrepresentation on the part of said representatives. *Orth v. Kaesche* 213

- (52.) **SAME.**

Such agreements not having been carried out were nothing more than orders upon the executors to make payment to persons to whom the legatees owed nothing, and were, therefore, subject to revocation at any time before they had been complied with. *Id.*

- (53.) **WILLS—DISPOSITION OF REMAINDER OF ESTATE—WHEN GIFT OF REMAINDER VESTS—INTENTION OF TESTATOR—WHO ENTITLED TO ENTIRE REMAINDER.**

Where a testator, in disposing of the remainder of his estate after a life estate therein to a sister, directed the conveyance of one-half of his property to a niece, the payment of a certain sum to another sister, and the residue to still another sister to be conveyed at her death to her two sons and a daughter, the gift of the remainder of testator's estate was future and contingent and did not vest until the death of the life tenant.

- (54.) **SAME.**

Where by the same paragraph of the will disposing of the residue it was provided that should any of testator's sisters, nieces or nephews die before the life tenant of the whole estate the property should be divided *pro rata* among the persons mentioned, testator's evident intention was to confine the distribution of the remainder among such of those mentioned in the will as were living at the death of the life tenant, and one of testator's nephews who was the only person mentioned in the will who survived the life tenant of the entire estate was entitled to the remainder. *Matter of Duffy* 329

- (55.) **WILLS—DIRECTION AS TO DIVISION OF REMAINDER—PROVISIONS AS TO DIVISION OF RESIDUARY ESTATE.**

Testatrix directed the division of the remainder of her estate between her two sisters, and "after that" among the living children of her own

and her half brothers and sisters except the children of a deceased brother already provided for. Testatrix was survived by her sisters and a large number of nephews and nieces. A nephew and a niece predeceased testatrix and each left issue which survived her. *Held*, that the residuary estate should be divided into two parts; that the income from one of such parts should be paid to each of her sisters during their lives; that the bequest was to them as tenants in common, and that upon the death of either the one-half of the residuary estate held for her benefit should be divided among the nephews and the nieces of testatrix living at the time of her death. *Matter of Leigh*..... 336

(56.) WILL—REVOCATION—PRESUMPTION WHERE WILL CANNOT BE FOUND—EVIDENCE—CONTENTS OF LOST WILL—WHEN COMMUNICATIONS TO ATTORNEY NOT PRIVILEGED.

Where a will which in terms revoked all prior wills was delivered to the testatrix and it cannot be found after her death or its whereabouts accounted for, it is presumed that it was destroyed by her with an intention to revoke it. *Matter of Bennett*..... 470

Where directions for the preparation of a will were given by the testatrix to an attorney in the presence of a third person, her friend, and the will when drawn was read to the testatrix in the hearing of said person, the attorney after the death of the testatrix is competent to testify both to the execution of the will and to the fact that it contained a clause revoking all former wills, for under such circumstances the prohibition contained in section 835 of the Code of Civil Procedure does not apply. *Id.*

(57.) WILLS—REVOCATION OF—WHAT ARE SPECIFIC LEGACIES—PROVISIONS AS TO LAPSE OF CERTAIN BEQUESTS.

Legacies of a certain clustered diamond ring and a remainder interest in a certain table-cloth and of a certain long diamond chain are specific legacies. *Matter of Kathan*..... 369

(58.) SAME.

Where testatrix in a separate clause in the same paragraph by which she made such specific legacies bequeathed her remaining jewelry in the following order: to her husband any one piece which he might select, he to have first choice; to another any one remaining piece of said jewelry the legatee to have eleventh choice, and a codicil revoked a legacy of any one remaining piece of said jewelry given to one who was to have second choice, a gift of the remainder of testatrix's jewelry and other articles of personal use, together with her silverware, to her executors with request that they give the same to such friends of testatrix as they might select,

refers solely to jewelry remaining after the payment of the specific legacies and the several legatees had made their choice from the "remaining jewelry," and under it legacies which have failed because of the revocation by the codicil did not pass. Id.

(59.) SAME.

Where a will provides that should certain bequests lapse or fail for any reason such bequests should go to and form part of the residuary estate and be disposed of in accordance with a clause naming a certain person as sole residuary legatee, he takes the lapsed legacies. Id.

(60.) SAME.

A bequest of all furniture, pictures except family portraits and certain furniture subsequently mentioned and contained in the residence of testatrix includes the rugs, draperies and furnishings of said residence which were not specifically disposed of by the will. Id.

(61.) WILLS—DELIVERY OF CHECK BY TESTATOR THREE DAYS BEFORE DEATH—REVOCATION OF AUTHORITY.

Where testator drew his check for \$20,000 to the order of his daughter and delivered it to her three days before his death, and she delivered it to her own bank which, through its correspondent, collected it from the trust company on which it was drawn, but it was not paid to her until two days after decedent's death, her contention upon the accounting of the executors, of whom she was one, that by the delivery of the check to her and payment thereof she became the absolute owner of the \$20,000 was untenable and she must restore it to the estate. Matter of Mead 340

(62.) SAME.

Upon the delivery of the check to the daughter she became decedent's agent to withdraw the amount called for by said check, and her authority as such agent was revoked by his death. Id.

Ex. p. 111
10/2/14



